

THE FEDERAL RAILROAD SAFETY ACTS AND THE F.E.L.A.: A COMPARISON

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INTRODUCTION

A discussion of the interrelation of the Safety Appliances Acts¹ and the Boiler Inspection Act² with the Federal Employers' Liability Act,³ may appropriately begin with some legislative history to indicate the development of federal legislation in regard to railroad safety. Federal legislation in this field received its first real impetus about 1889 when President Harrison in his message to Congress⁴ and the Interstate Commerce Commission in its annual report to Congress⁵ referred to the great risks involved in railroading and particularly to the use of link-and-pin couplers and of brakes which were not continuous throughout the train and controlled automatically from the engine. These were followed by Presidential Messages in 1890, 1891 and 1892,⁶ and by references to the problem in the Fifth and Sixth Annual Reports of the Interstate Commerce Commission.⁷ It should be noted that the major emphasis of these messages and reports was directed to the risks to life and limb of employees involved in coupling operations and the use of handbrakes rather than a unified system of air brakes. In the Senate and House Reports on bills arising from these recommendations, the same emphasis is evident.⁸ When the original Safety Appliance Act was passed in 1893, its preamble read:

An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and con-

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¹ Acts of March 2, 1893, c. 196, 27 STAT. 531, as amended, 45 U.S.C. §§1-7 (1952 ed.); March 2, 1903, c. 976, 32 STAT. 943, 45 U.S.C. §§8-10 (1952 ed.); April 14, 1910, c. 160, 36 STAT. 298, 45 U.S.C. §§11-16 (1952 ed.). Hereinafter these Acts will be cited by the date of the original act, section of the original act and the U.S. Code section.

² Act of February 17, 1911, c. 103, 36 STAT. 913, as amended, 45 U.S.C. §§22-34 (1952 ed.) Hereinafter this Act will be cited by the section of the original act and the U.S. Code section.

³ Act of April 22, 1908, c. 149, 35 STAT. 65, as amended, 45 U.S.C. §§51-60 (1952 ed.) This act will be referred to throughout this article as FELA, and citations will be to the sections of the original act and the U.S. Code section.

⁴ The relevant portions of this message appear in SEN. REP. No. 1049, 52d Cong., 1st Sess. 1 (1892).

⁵ 3 I.C.C. ANN. REP. 84, 293 (1889).

⁶ See SEN. REP. No. 1049, 52d Cong., 1st Sess. 1-3 (1892), for the relevant portions of these messages.

⁷ 5 I.C.C. ANN. REP. 337 (1891); 6 I.C.C. ANN. REP. 69 (1892).

⁸ SEN. REP. No. 1049, 52d Cong., 1st Sess. 5-6 (1892); H.R. REP. No. 1678, 52d Cong., 1st Sess. 3 (1892).

tinuous brakes and their locomotives with driving-wheel brakes, and for other purposes.⁹

The first section of this original Act made it unlawful for a common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic if it was not equipped with power brakes and appliances for operating a train-brake system or to run a train in such traffic without sufficient cars equipped with power brakes so that the engineer in the locomotive could control its speed without requiring brakemen to use handbrakes.¹⁰ The Act also prohibited a railroad from hauling or permitting to be hauled or used on its line "any car used in moving interstate traffic," unless it be equipped with couplers "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."¹¹ Another section prohibited the use of any car in interstate commerce unless it be provided with "secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."¹² The Act also provided for the establishment of uniform height for drawbars, an essential part of the coupling apparatus, and prohibited the use of any freight car in interstate traffic which did not comply with this standard.¹³ For each and every violation of the provisions of this Act, a penalty of \$100 was imposed, to be recovered by the United States District Attorney in the district where the violation occurred.¹⁴ Finally, the Act provided that "any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."¹⁵

In 1903, the provisions relating to brakes, automatic couplers, grab irons and drawbars were extended to apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," except four-wheel cars, logging cars and cars used upon street railways.¹⁶ This had the effect of including within the pro-

⁹ 27 STAT. 531 (1893). Similar preambles also occurred in the other two Safety Appliance Acts of 1903 and 1910.

¹⁰ Act of March 2, 1893, §1, 45 U.S.C. §1 (1952 ed.).

¹¹ Act of March 2, 1893, §2, 45 U.S.C. §2 (1952 ed.).

¹² Act of March 2, 1893, §4, 45 U.S.C. §4 (1952 ed.).

¹³ Act of March 2, 1893, §5, 45 U.S.C. §5 (1952 ed.).

¹⁴ Act of March 2, 1893, §6, as amended 45 U.S.C. §6 (1952 ed.).

¹⁵ Act of March 2, 1893, §8, 45 U.S.C. §7 (1952 ed.).

¹⁶ Act of March 2, 1903, §1, 45 U.S.C. §8 (1952 ed.). This same section contains a provision that the original act should apply "whether or not the couplers brought together are of the same kind, make, or type;" which was apparently added in answer to the practice of different carriers using different couplers which

visions of the Act cars which were in fact being used in transporting intrastate freight or passengers, so long as the carrier itself was engaged in interstate commerce.¹⁷

The 1910 Safety Appliance Act¹⁸ added further appliances to the list required.¹⁹ A \$100 penalty was imposed for violation of its provisions of the Act cars which are in fact being used in transporting intrastate freight or passengers, so long as the carrier itself was engaged in that such crippled car might be hauled from the place of discovery "to the nearest available point where such car can be repaired" without penalty, but adding "such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this chapter."²⁰

The Boiler Inspection Act,²¹ passed in 1911, contained a preamble like that of the Safety Appliance Acts and provided, *inter alia*, that:

It shall be unlawful for any common carrier, its officers or agents, subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this Act, and be able to withstand such test or tests as may be prescribed in the rules and regulation hereinafter provided for.²²

Another section of the Act²³ made the rules and regulations of carriers as approved by the Interstate Commerce Commission obligatory and provided for changes to be filed and approved by the Commission.

In 1915, the Boiler Inspection Act was amended to include not only the boiler, but "the entire locomotive and tender and all parts and

did not couple with each other automatically. See 7 I.C.C. ANN. REP. 74, 76 (1893); 16 I.C.C. ANN. REP. 57, 61, 62 (1902).

¹⁷ See, *e.g.*, *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916); *Southern Ry. v. United States*, 222 U.S. 20 (1911); *Fort Worth Belt Ry. v. United States*, 22 F. 2d 795 (5th Cir. 1927); *Pacific Coast Ry. v. United States*, 173 Fed. 448 (9th Cir. 1909); *Ross v. Duluth, M & I. R. Ry.*, 203 Minn. 312, 218 N.W. 76 (1938).

¹⁸ Act of April 14, 1910, 45 U.S.C. §11-16 (1952 ed.).

¹⁹ Sill steps, efficient hand brakes, secure ladders, secure running boards, secure handholds.

²⁰ Act of April 14, 1910, §4, 45 U.S.C. §13 (1952 ed.).

²¹ Act of February 11, 1911, as amended, 45 U.S.C. §§22-34 (1952 ed.).

²² Act of February 11, 1911, §2, as amended, 45 U.S.C. §23 (1952 ed.).

²³ Act of February 11, 1911, §5, as amended 45 U.S.C. §28 (1952 ed.).

appurtenances thereof.”²⁴ Seven years later another amendment removed reference to interstate and foreign commerce from the relevant sections.²⁵ Although some courts since that date have referred to the Act as covering only engines moving in interstate commerce, the problem before them seems to have been whether the car or locomotive was being “used on its line” rather than whether the car was “moving interstate or foreign traffic.”²⁶

With the exception of the abolition of the defense of assumption of risk under the Safety Appliance Act²⁷ and the proviso in the 1910 Act with relation to movement of defective cars to the nearest available repair point being at the carrier’s sole risk,²⁸ neither the Safety Appliance Acts nor the Boiler Inspection Act makes any reference to a right of action in persons who may be injured by violations of their provisions. Yet, the preambles of the acts spell out that they are for the protection of “employees and travelers upon railroads.” The lack of more explicit language creating causes of action under these acts today may arise from the fact that in 1906²⁹ and again in 1908,³⁰ the Federal Employers’ Liability Acts specifically created a cause of action in the case of an employee of an interstate railroad for injuries or death “resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery . . . or other equipment.”³¹ While the original FELA apparently extended to employees who were engaged in intrastate commerce,³² the present day act is limited to injuries or death suffered “while he is employed by such carrier in such [interstate] commerce.”³³ In 1939, the FELA was amended to extend the coverage to employees, any part of whose duties “shall be in the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth. . . .”³⁴ Aside from these statutory provisions, the courts have for many years recognized that where there is a violation of the

²⁴ Act of March 4, 1915, c. 169, §1, 38 STAT. 1192.

²⁵ Act of June 7, 1924, c. 355, §2, 43 STAT. 659, 45 U.S.C. §23 (1952 ed.).

²⁶ See, e.g., *Compton v. Southern Pac. Co.*, 70 Cal. App. 2d 267, 161 P. 2d 40 (1945); *Harlan v. Wabash Ry.*, 335 Mo. 414, 73 S.W. 2d 749 (1934).

²⁷ Act of March 2, 1893, §8, 45 U.S.C. §7 (1952 ed.).

²⁸ Act of April 14, 1910, §4, 45 U.S.C. §13 (1952 ed.).

²⁹ Act of June 11, 1906, c. 3073, 34 STAT. 232, declared unconstitutional in *Employers’ Liability Cases*, 207 U.S. 463 (1908).

³⁰ Act of April 22, 1908, c. 149, §5 STAT. 65, as amended, 45 U.S.C. §§51-60 (1952 ed.).

³¹ Act of April 22, 1908, §1, 45 U.S.C. §51, first paragraph (1952 ed.).

³² *Employers’ Liability Cases*, 207 U.S. 463 (1908).

³³ Act of April 22, 1908, §1, 45 U.S.C. §51 (1952 ed.).

³⁴ Act of August 11, 1939, c. 685, §1, 53 STAT. 1404, 45 U.S.C. §51, second paragraph (1952 ed.).

Safety Appliance or Boiler Inspection Acts, the violation may give rise to a common law cause of action.³⁵

In the discussion which follows, these three acts will be compared in terms of the nature of the duty imposed upon the carrier under each, how a breach of such duty may be established, the extent of protection offered by the acts in terms of potential plaintiffs and injuries covered, the defenses available to carriers under each of the acts, and certain problems of joinder and pleading of causes of action under the acts.

NATURE OF THE CARRIER'S DUTY AND BREACH THEREOF

The most obvious distinction between the FELA on the one hand and the Safety Appliance and Boiler Inspection Acts on the other is the nature of the duty which is imposed upon the carrier under each. The FELA predicates liability upon the "negligence" of the carrier, its officers, agents and employees, which the courts have uniformly taken to mean the common law doctrines of negligence which would be applied in other types of personal or property injury actions.³⁶ Variations from this common law doctrine arise from the specific language of the Act itself in abolishing assumption of risk³⁷ and the "fellow servant" doctrine³⁸ as absolute defenses and introducing the concept of "compara-

³⁵ See, e.g., *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1915); *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205 (1934); *Gilvary v. Cuyahoga Valley Ry.*, 292 U.S. 57 (1934).

³⁶ See, e.g., *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949); *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352-353 (1943); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1942); *Eckenrode v. Pennsylvania R.R.*, 164 F. 2d 996, 998 (3d Cir. 1947); *aff'd*, 335 U.S. 329 (1947); *Atlantic Coast Line R.R. v. Johnson*, 199 F. 2d 750, 751 (5th Cir. 1952), *rehearing denied*, 200 F. 2d 619 (5th Cir. 1952); *Hutchins v. Akron, C. & Y. R.R.*, 162 F. 2d 189, 192 (6th Cir. 1947); *Larsen v. Chicago & N.W. R.R.*, 171 F. 2d 841, 844 (7th Cir. 1948); *Sheaf v. Minneapolis, St. P., M. & O. R.R.*, 162 F. 2d 110, 113 (8th Cir. 1947); *Carpenter v. Atchison, T. & S.F. Ry.*, 109 Cal. App. 2d 18, 21-22, 240 P. 2d 5, 7 (1952); *Hughes v. Terminal R.R. Ass'n*, 265 S.W. 2d 273, 277 (Mo. 1954); *Ellis v. Union Pac. R.R.*, 147 Neb. 18, 21-22, 22 N.W. 2d 305, 308 (1946), *rev'd on other grounds*, 329 U.S. 649 (1947); *Beam v. Baltimore & O. R.R.*, 77 Ohio App. 419, 426-427, 68 N.E. 2d 159, 164 (1945); *August v. Texas & N. O. R.R.*, 265 S.W. 2d 148, 152 (Tex. Civ. App. 1954).

³⁷ Act of April 22, 1908, §4, as amended, 45 U.S.C. §54 (1952 ed.): "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

³⁸ Act of April 22, 1908, §§1, 4, as amended, 45 U.S.C., §§51, 54 (1952 ed.), refer to injuries "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier," which language has been interpreted as doing away with the "fellow servant" doctrine. *Tiller v. Atlantic Coast Line*

tive negligence" rather than contributory negligence into actions brought under the FELA alone.³⁹ Included in this concept of duty is the principle stated by the Supreme Court at about the time when the Safety Appliance Acts were given their first official impetus:

Neither individuals nor corporations are bound, as employers to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of these appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter.⁴⁰

Contrasted with the requirement of "reasonable care" implicit in the FELA is the language of the Safety Appliance Acts, which speak of failure to comply with their provisions as "unlawful." Since the Acts are designed for the protection of a specified class, "employees and travelers upon railroads,"⁴¹ they could be treated as setting up definite standards of "due care" violation of which would constitute "negligence per se."⁴² However, the leading case on the question of the nature of

R.R., 318 U. S. 54 (1943); *Jamison v. Encarnacion*, 281 U.S. 635 (1930); *Chesapeake & O. Ry. v. De Atley*, 241 U. S. 310 (1916); *Minneapolis, St. P. & S.S.M. Ry. v. Rock*, 279 U. S. 410 (1929); *Chicago, R.I. & P. Ry., v. Ward*, 252 U. S. 18 (1920); *Central Vermont Ry. v. White*, 238 U. S. 507 (1915).

³⁹ Act of April 22, 1908, §3, 45 U.S.C. §53 (1952 ed.): "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of suuch employee." A fuller discussion of the effect of the three Acts upon these defenses will be found *infra* p. 000.

⁴⁰ *Washington & G. R.R. v. McDade*, 135 U.S. 554, 570 (1889); *accord*, *Patton v. Texas & Pac. Ry.*, 179 U.S. 658, 664 (1901). See also 2 JAGGARD, TORTS §279 (1895); LABATT, MASTER & SERVANT §§14, 22a (1904); POLLOCK, TORTS 88 (1887); PROSSER, TORTS §67 (2d ed. 1955), for the common law duty of master to servant.

⁴¹ See, Preamble, 27 STAT. 531 (1893). It should be noted that persons other than employees and travelers on the railroad have in fact recovered under this Act. *Fairport, P. & E. R.R. v. Meredith*, 292 U.S. 589 (1934) (travelers on highway); *Shields v. Atlantic Coast Line R.R.*, 350 U.S. 318 (1956) (independent contractor unloading tank car for consignee); *Rush v. Thompson*, 356 Mo. 568, 202 S.W. 2d 800 (1947) (government employee engaged in unloading coal).

⁴² At the time of the original Safety Appliance Act, it was recognized that the violation of a specific legislative provision, designed for the protection of a particular class of persons, might be treated, without specific provision for civil liability, as creating a duty toward anyone within the protected class. 2 JAGGARD,

the duty imposed by the Safety Appliance Acts, *St. Louis, Iron Mountain & Superior Ry. v. Taylor*,⁴³ spoke in terms of an "absolute duty" which was to supplant the "qualified duty of the common law," and violation of which absolute duty created "the liability to make compensation to one who is injured by it."⁴⁴ This language of "absolute duty" has been repeated again and again by the Supreme Court and others.⁴⁵ While an-

TORTS §263 (1895). This was spoken of as "negligence per se," in the sense that the jury was not entitled to determine whether a reasonable man might have anticipated harm as likely to result from the act which violated the statute or whether a reasonable man would have done the act. See Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 319-323 (1914); PROSSER, TORTS 161 (2d ed. 1955). Cf. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932). Professor Clarence Morris has expounded the theory that, in applying criminal statutes in civil actions, the courts are in fact creating a duty of their own based on a criminal standard established by the legislature. MORRIS, TORTS 64-77 (1953); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUMB. L. REV. 21 (1949), reprinted in MORRIS, STUDIES IN THE LAW OF TORTS 141 (1953); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933). While Thayer, Lowndes, Morris and Prosser speak of "criminal legislation," their discussions seem equally applicable to the Safety Appliance and Boiler Inspection Acts which do impose penalties for violation, 45 U.S.C. §§ 6, 13, 34 (1953 ed.). Actions brought under these penalty sections are treated as civil rather than criminal actions, *Chicago, B. & Q. Ry. v. United States*, 220 U.S. 559 (1911); *United States v. Great Northern Ry.*, 229 Fed. 927 (9th Cir. 1916), and while the Supreme Court has admitted that the Safety Appliance Acts have a penal aspect, it says "But the design to give relief was more dominant than to inflict punishment . . ." *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 17 (1904). Presumably a similar evaluation would be made of the Boiler Inspection Act.

⁴³ 210 U.S. 281 (1908).

⁴⁴ *Id.* at 295.

⁴⁵ *E.g.*, *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938); *St. Joseph & G.I. Ry. v. Moore*, 243 U.S. 311, 314 (1917); *Delk v. St. Louis & S.F. R.R.*, 220 U.S. 580, 586-587 (1911); *Lehigh Valley R.R. v. Howell*, 6 F. 2d 784, 785 (2d Cir. 1925); *Philadelphia & R. Ry. v. Auchenbach*, 16 F. 2d 550, 552 (3d Cir. 1926); *Philadelphia & R. Ry. v. Eisenhart*, 280 Fed. 271, 276 (3d Cir. 1922); *Sherry v. Baltimore & O. R.R.*, 30 F. 2d 487, 488 (6th Cir. 1929); *Chicago Junction R.R. v. King*, 169 Fed. 372, 376 (7th Cir. 1909); *aff'd*, 222 U.S. 222 (1911); *Byler v. Wabash R.R.*, 196 F. 2d 9, 11 (8th Cir. 1952), *cert. denied*, 344 U.S. 826 (1952); *Zumwalt v. Gardner*, 160 F. 2d 298, 304 (8th Cir. 1947); *United States v. Northern Pac. Ry.*, 287 Fed. 780, 783 (9th Cir. 1923); *Bocook v. Louisville & N. R.R.*, 67 F. Supp. 154, 157 (E.D. Ky. 1946); *Campbell v. Pittsburgh & W. Va. R.R.*, 122 F. Supp. 749, 751 (W.D. Pa. 1954); *Southern Pac. Co. v. Thomas*, 21 Ariz. 355, 358, 188 Pac. 268, 270 (1920), *cert. denied*, 255 U.S. 576 (1921); *Western & A. R.R. v. Gentle*, 58 Ga. App. 282, 290, 198 S.E. 257, 262 (1938), *cert. denied*, 305 U.S. 654 (1938); *Davis v. Michigan Cent. R.R.*, 294 Ill. 355, 359, 128 N.E. 539, 540 (1920); *Crowe v. Boston & M. R.R.*, 242 Mass. 389, 394, 136 N.E. 189, 191 (1922); *Hallada v. Great Northern Ry.*, 69 N.W. 2d 673, 681 (Minn. 1955); *Popplar v. Minneapolis, St. P. & S.S.M. Ry.*, 121 Minn. 413, 416, 141 N.W. 798, 799 (1913), *aff'd*, 237 U.S. 369 (1956); *Alabama & V. Ry. v. Dennis*, 128 Miss. 298, 301, 91 So. 4, 5 (1922); *Colwell v. St. Louis-S.F. Ry.*, 335 Mo. 494, 502, 73 S.W. 2d 222, 226 (1934); *Grew v. Boston & M. R.R.*, 83 N.H. 383, 386, 142 Atl.

other leading case, *San Antonio & Arkansas Pass Ry. v. Wagner*,⁴⁶ refers to a violation of the Safety Appliance Acts as "negligence"—what is sometimes called negligence per se," it also makes it clear that "the question of negligence in the general sense of want of care is immaterial."⁴⁷ And in the recent case of *O'Donnell v. Elgin, Joliet & Eastern Ry.*,⁴⁸ the Court, after referring to the "diversity of judicial opinion concerning the consequences attributed in negligence actions to violations of a statute," goes on to say:

But this court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence.⁴⁹

In *Carter v. Atlanta & St. Andrews Bay Ry.*,⁵⁰ referring to the *O'Donnell* decision earlier in the same term, the Court says that "negligence per se" is "a confusing label for what is simply a violation of an absolute duty."⁵¹ It is perhaps significant that in each of these two cases, as in *Affolder v. New York, Chicago & St. Louis R.R.*,⁵² which followed them, the question was not one of the nature of the duty so much as a problem of whether a mere failure to operate efficiently constituted a breach of the duty imposed by the statute.

A similar duty is found in the cases decided under the Boiler Inspection Act, such as *Baltimore & Ohio v. Groeger*,⁵³ *Southern Ry. v. Lunsford*,⁵⁴ and *Lilly v. Grand Trunk Western R.R.*,⁵⁵ all of which speak of an "absolute and continuing duty."⁵⁶ While the Court in

707, 709 (1928); *Saxon v. Delaware & H. Co.*, 256 N.Y. 363, 364, 176 N.E. 425, 425 (1931); *Galveston, H. & S.A. Ry. v. Kurtz*, 147 S.W. 658, 660 (Tex. Civ. App. 1912, error denied).

⁴⁶ 241 U.S. 476 (1916).

⁴⁷ *Id.* at 484. The use of the term "negligence per se" may be justified on the ground that the action was brought under the FELA which speaks of a defect "due to its negligence."

⁴⁸ 338 U.S. 384 (1949).

⁴⁹ *Id.* at 391.

⁵⁰ 338 U.S. 430 (1949).

⁵¹ *Id.* at 434.

⁵² 339 U.S. 86 (1950).

⁵³ 266 U.S. 521, 523-524, 527 (1925).

⁵⁴ 297 U.S. 398, 401 (1936).

⁵⁵ 317 U.S. 481, 485 (1943).

⁵⁶ See also, *Lehigh Valley R.R. v. Beltz*, 10 F. 2d 74, 76-77 (2d Cir. 1925), *cert. denied*, 270 U.S. 641 (1926); *Chesapeake & O. Ry. v. Rich*, 81 F. 2d 584, 586 (6th Cir. 1936); *McCarthy v. Pennsylvania R.R.*, 156 F. 2d 877, 881 (7th Cir. 1946); *Alabama Great Southern R.R. v. Smith*, 256 Ala. 220, 227, 54 So. 2d 453, 458 (1951); *Thornton v. Minneapolis & St. L. R.R.*, 187 Iowa 1158, 1162, 175 N.W. 71, 73 (1919); *Louisville & N. R.R. v. Stephens*, 298 Ky. 328, 337, 182 S.W. 2d 447, 453 (1944); *O'Dea v. Byram*, 176 Minn. 67, 68, 222 N.W. 519, 520 (1928); *Banta v. Union Pac. R.R.*, 362 Mo. 421, 428, 242 S.W. 2d 34, 39 (1951).

*Urie v. Thompson*⁵⁷ uses the term "negligence per se" it relies on *San Antonio & Arkansas Pass. Ry. v. Wagner*, and treats the Boiler Inspection Act as in the same category as the Safety Appliance Acts.⁵⁸ Therefore, the later decisions in the *O'Donnell*, *Carter* and *Affolder* cases would seem to apply to the Boiler Inspection Act as well.

Although the courts talk in terms of an "absolute" duty, it is clear that the Safety Appliance and Boiler Inspection Acts do not create something akin to workmen's compensation.⁵⁹ The carrier is not an insurer against all and any injuries resulting from railroad operations, but only becomes responsible for failure to supply equipment which is safe within the terms of these Acts.⁶⁰ Even this obligation is not a wholly unqualified one:

First, although the courts have stated repeatedly that the Safety Appliance Acts and the Boiler Inspection Act should be construed liberally to effectuate their humanitarian objectives,⁶¹ in some instances the language of the Acts has been so construed as to limit the scope of liability. When Section 1 of the Safety Appliance Act requires that all trains have a sufficient number of cars equipped with power brakes, the courts construe "train" to refer only to a combination of a locomotive engine and cars assembled and coupled together as a unit for a run or trip along the road,⁶² as contrasted with cars coupled together in a switching operation within a single yard⁶³ which involves assembling and

⁵⁷ 337 U.S. 163 (1949).

⁵⁸ *Id.* at 188-189.

⁵⁹ *Myers v. Reading Co.*, 331 U.S. 477, 485 (1947); *Ehalt v. McCarthy*, 104 Utah 110, 138 P. 2d 639, 644 (1943).

⁶⁰ See, *Myers v. Reading Co.*, 331 U.S. 477, 485 (1947); *O'Dea v. Byram*, 176 Minn. 67, 71, 222 N.W. 519, 520 (1928); *Larsen v. Northern Pac. Ry.*, 175 Minn. 1, 5, 220 N.W. 159, 161 (1928). *Cf.* *Cusson v. Canadian Pac. Ry.*, 155 F. 2d 430 (2d Cir. 1940); *Knox v. Atchison, T. & S.F. Ry.*, 95 Cal. App. 2d 896, 214 P. 2d 589 (1950); *Johnson v. Chicago G.W. Ry.*, 64 N.W. 2d 373 (Minn. 1954); *Schaff v. Perdue*, 254 S.W. 151 (Tex. Civ. App. 1933). See also, *Banta v. Union Pac. R.R.*, 362 Mo. 421, 428, 242 S.W. 2d 34, 39 (1951) ("insurer as to matters included in the [Boiler Inspection] Act"); *Cantley v. Missouri-K.-T. R.R.*, 353 Mo. 605, 612, 183 S.W. 2d 123, 126 (1944) ("insurer with respect to the matters mentioned in the Boiler Inspection Act").

⁶¹ See, *e.g.*, *Lilly v. Grand Trunk Western Ry.*, 317 U.S. 481, 486 (1943); *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938); *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 17-18 (1904); *Bolan v. Lehigh Valley R.R.*, 167 F. 2d 934, 936 (2d Cir. 1948); *Hines v. Smith*, 275 Fed. 766, 767 (7th Cir. 1921); *Southern Pac. Co. v. Carson*, 169 F. 2d 734, 737 (9th Cir. 1948); *Missouri-K.-T. Ry. v. Evans*, 151 Tex. 340, 344, 250 S.W. 2d 385, 388 (1952).

⁶² *United States v. Erie R.R.*, 237 U.S. 402, 407 (1915); see also *United States v. Chicago, B. & Q. Ry.*, 237 U.S. 410 (1915); *United States v. Grand Trunk Ry.*, 203 Fed. 775 (S.D.N.Y. 1913).

⁶³ Where a railroad operated a terminal which included yards in three cities, the Court treated these as three separate yards rather than a single yard so that transfers from one point in the terminal to another were rated as "train movements." *United States v. Erie R.R.*, 237 U.S. 402 (1915). See also *Great*

breaking up "trains" and "sorting, or selecting, or classifying of [the cars], involving coupling and uncoupling, and the movement of one or a few at a time for short distances."⁶⁴ The basis for this distinction would appear to be the inconvenience to the carrier in conducting switching operations if it were necessary to maintain air connections between all of the cars. Also, when Section 2 of the Act requires all cars to be equipped with couplers which would couple automatically upon impact without the necessity of men going between the cars, the Supreme Court has interpreted "cars" as used here to exclude the locomotive and tender, which may be coupled with the old link-and-pin coupler, since these two move as a single unit in normal operations and are so situated that it is possible to couple and uncouple the tender from the locomotive without the men actually being in danger of getting caught between them.⁶⁵ Similarly, although tenders are treated as cars within the terms of Section 4 requiring all cars used in interstate commerce to be equipped with secure grabirons,⁶⁶ the Court has said that the language of Section 11, providing that "all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders," does not include tenders because they have no "roofs" and because the I.C.C. regulations providing for ladders on tenders do not refer to grabirons.⁶⁷ Other examples of limited interpretations of the Act include the decision of a Court of Appeals⁶⁸ and the opinion of three dissenting justices of the Supreme Court⁶⁹ that an insecure "dome step" on a tank car did not fall within the requirement of secure running boards in Section 11 when not required by the I.C.C. regulations; and the case of a ladder which complied with the I.C.C. regulation for clearance although it was alleged to be insecure within the terms of Section 11 because of the presence of a brace rod which

Northern Ry. v. United States, 288 Fed. 190 (8th Cir. 1923); United States v. Southern Pac. Co., 100 F. 2d 894 (9th Cir. 1939); United States v. Southern Pac. Co., 60 F. 2d 864 (9th Cir. 1932).

⁶⁴ *Louisville & Jeffersonville Bridge Co. v. United States*, 249 U.S. 534, 538 (1919). Compare *United States v. Northern Pac. Ry.*, 254 U.S. 251 (1920); *Chicago, St. P., M. & O. Ry. v. United States*, 36 F. 2d 670 (8th Cir. 1929); *United States v. Southern Pac. Co.*, 60 F. 2d 665 (9th Cir. 1932), involving "train movements", with *United States v. New York C. & H. R.R.*, 205 Fed. 428 (W.D. N.Y. 1913); *Seaboard Air Line R.R. v. Watson*, 94 Fla. 571, 113 So. 716 (1927); *Rose v. Terminal R.R. Ass'n*, 237 S.W. 854 (Mo. App. 1922); *Whalley v. Philadelphia & R. Ry.*, 248 Pa. 298, 93 Atl. 1016 (1915), involving "switching operations." See also *Philadelphia & R. Ry. v. Bartsch*, 9 F. 2d 858 (3d Cir. 1925).

⁶⁵ *Pennell v. Philadelphia & R. Ry.*, 231 U.S. 675 (1914).

⁶⁶ *Moore v. St. Joseph & G.I. Ry.*, 268 Mo. 31, 186 S.W. 1035 (1916), *aff'd*, 242 U.S. 311 (1917).

⁶⁷ *Davis v. Manry*, 266 U.S. 401 (1925).

⁶⁸ *Atlantic Coast Line R.R. v. Shields*, 220 F. 2d 242 (5th Cir. 1955), *rev'd*, 350 U.S. 318 (1956).

⁶⁹ *Shields v. Atlantic Coast Line R.R.*, 350 U.S. 318, 325 (1956) (Reed, Frankfurter and Burton, J.J., dissenting. Harlan, J., took no part in this case).

ran at an angle near the bottom of the ladder.⁷⁰ In each of these cases, the courts may only be saying that the I.C.C. and the carriers themselves are better able to determine what are necessary safety devices than are courts or juries.⁷¹ Literal interpretation has not always resulted in a narrowing of the carrier's obligation, however, as is indicated by the fact that an early view finding compliance with the grab iron requirement of Section 4 in any other appliance which afforded equal security⁷² seems to have been abandoned in more recent decisions saying that no equivalents are acceptable.⁷³

The Boiler Inspection Act is written in broader terms than the Safety Appliance Acts, *i.e.*, "It shall be unlawful for any carrier to use . . . any locomotive unless *said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate* in the service to which the same are put, that the same may be employed in the active service of such carrier *without unnecessary peril to life or limb, . . .*"⁷⁴ Such language would appear to cover almost any possible danger which could arise from the operation of a locomotive and tender. Yet, most of the cases arising under this Act have restricted recovery to injuries arising from mechanical defects or inadequacies in

⁷⁰ Atchison, T. & S.F. Ry. v. Scarlett, 300 U.S. 471 (1937).

⁷¹ This point is made in both the *Scarlett* case, *supra* note 70, and the Court of Appeals opinion in the *Shields* case, where the court said, ". . . a chaotic condition would be produced if the questions of compliance with the Safety Appliance Act, and the specifications governing the number, location, dimension and manner of appliances should be left to the varying notions of judges or the inexperienced laymen who comprise petit juries." 200 F. 2d 242, 245 (5th Cir. 1955). The majority of the Supreme Court, however, felt that the failure of the I.C.C. to include dome steps in its regulations showed no more than that it had not standardized all possible running boards. They pointed out that as contrasted with *Davis v. Manry*, 266 U.S. 401 (1925), referred to in text at note 67 *supra*, where the I.C.C. could interpret "roofs" in Section 11 as applying to tenders or not, there was no such necessity for decision in the case of dome steps. 350 U.S. 318, 322. The majority also said that "considerations of administrative expertise relevant to §3 [45 U.S.C. §12 (1952 ed.) providing for designation of standard equipment by the I.C.C.] are not equally applicable to the effectuation of the purpose of §2 [45 U.S.C. §11 (1952 ed.) requiring secure running boards]," 350 U.S. at 322, and then referred to the fact that both the carrier, the manufacturer of the tank car and the railroad industry recognized that tank cars required secure dome running boards, *Id.* at 323-324.

⁷² United States v. Boston & M. R.R., 168 Fed. 148 (D. Mass. 1909).

⁷³ St. Joseph & G.I. Ry. v. Moore, 243 U.S. 211 (1917); United States v. Baltimore & O. R.R., 184 Fed. 94 (W.D. Va. 1910); Lemee v. Texas & Pac. Ry., 141 La. 769, 75 So. 676 (1917). It should be noted that in each of these cases the alleged substitute was a coupling lever and that each opinion points out that such a substitute does not in fact provide the same security which the required grab iron or handhold would do. It is also significant that United States v. Boston & M. R.R., *supra* note 72, was not specifically overruled or rejected.

⁷⁴ Act of February 17, 1911, §2, as amended, 45 U.S.C. §23 (1952 ed.) (emphasis added).

the equipment of locomotives and tenders.⁷⁵ Where, as in the case of many boiler explosions, the accident is the result of negligent operation of an otherwise safe locomotive, liability has been restricted to an action for negligence rather than recovery under the "absolute" duty of the Act.⁷⁶ Except where a specific appliance has been designated by the I.C.C. as necessary to render a locomotive safe to operate,⁷⁷ the courts have generally left it to the discretion of the carrier whether a specific appliance is required by the Act.⁷⁸ As one opinion put it, "it cannot be said that Congress intended that every gadget placed upon a locomotive by a carrier, for experimental purposes, should become part thereof within the rule of absolute liability."⁷⁹ However, the courts have recognized that the trier of fact may consider the available appliances which might be used to render a locomotive "in proper condition and safe to operate."⁸⁰ In *Lilly v. Grand Trunk Western Ry.*,⁸¹ the Supreme Court appeared

⁷⁵ See, e.g., *Southern Ry. v. Lunsford*, 297 U.S. 398 (1936); *Baltimore & O. R.R. v. Groeger*, 266 U.S. 521 (1925); *New Orleans & N. R.R. v. Scarlet*, 249 U.S. 328 (1919); *Alabama Great Southern R.R. v. Smith*, 256 Ala. 220, 54 So. 2d 453 (1951); *Thornton v. Minneapolis & St. L. R.R.*, 187 Iowa 1158, 175 N.W. 71 (1919); *O'Dea v. Byram*, 176 Minn. 67, 222 N.W. 519 (1928); *Slater v. Chicago, St. P., M. & O. Ry.*, 146 Minn. 390, 178 N.W. 813 (1920); *Banta v. Union Pac. R.R.*, 362 Mo. 421, 242 S. W. 2d 34 (1951); *Fryer v. St. Louis-S.F. Ry.*, 33 Mo. 740, 63 S.W. 2d 47 (1933), and cases therein cited; *Ehalt v. McCarthy*, 104 Utah 110, 138 P. 2d (1943), and cases therein cited.

⁷⁶ E.g., *Erie R.R. v. Lindquist*, 27 F. 2d 98 (3d Cir. 1928); *O'Dea v. Byram*, 176 Minn. 67, 222 N.W. 519 (1928); *Harlan v. Wabash Ry.*, 335 Mo. 414, 72 S.W. 2d 749 (1934); *Fryer v. St. Louis-S.F. Ry.*, 330 Mo. 740, 63 S.W. 2d 47 (1933); *Riley v. Wabash Ry.*, 328 Mo. 910, 44 S.W. 2d 136 (1931); *Ehalt v. McCarthy*, 104 Utah 110, 138 P. 2d 639 (1943). Cf. *Cochran v. Atchison, T. & S.F. Ry.*, 109 Kan. 303, 305, 198 Pa. 685, 686 (1921); *Louisville & N. R.R. v. Stephens*, 298 Ky. 328, 338, 182 S.W. 2d 447, 453 (1944).

⁷⁷ See, e.g., *Tiller v. Atlantic Coast Line R.R.* 323 U.S. 574 (1945); *Lilly v. Grand Trunk Western Ry.*, 317 U.S. 481 (1943); *Chicago Great Western R.R. v. Rambo*, 298 U.S. 100 (1936); *Louisville & N. R.R. v. Stephens*, 298 Ky. 328, 182 S.W.2d 447 (1944). The I.C.C. is empowered to make regulations as to what appliances are necessary for the safe operation of locomotives and tenders, Act of February 17, 1911, §§2, 5, as amended, 45 U.S.C. §§23, 28 (1952 ed.). As to the effect of a failure to make a regulation, compare *Great Northern Ry. v. Donaldson*, 246 U.S. 121 (1918), with *Southern Ry. v. Lunsford*, 297 U.S. 398 (1936). As to the limitations on the regulation making power of the I.C.C. see also, *United States v. Baltimore & O. R.R.*, 292 U.S. 454 (1935); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

⁷⁸ E.g., *Southern Ry. v. Lunsford*, 297 U.S. 398 (1936); *Baltimore & O. R.R. v. Groeger*, 266 U.S. 521 (1925); *Chicago & N.W. Ry. v. Bower*, 241 U.S. 470 (1916); *Knox v. Atchison, T. & S.F. Ry.*, 95 Cal. App. 2d 896, 214 P. 2d 589 (1950). See, *Gerow v. Seaboard Air Line Ry.*, 189 N.C. 813, 818, 128 S.E. 345, 347-348 (1925).

⁷⁹ *Southern Ry. v. Lunsford*, 297 U.S. 398, 402 (1936).

⁸⁰ *Great Northern Ry. v. Donaldson*, 246 U.S. 121 (1918); *Gerow v. Seaboard Air Line Ry.*, 189 N.C. 813, 128 S.E. 345 (1925).

⁸¹ 317 U.S. 481 (1943).

to broaden the scope of the Boiler Inspection Act to include a dangerous condition resulting from the formation of ice on the top of a tender. While the language of the opinion indicates that the Court did not feel that mechanical defects were the sole bases for liability under the Act,⁸² it should be noted that great reliance was placed on a rule of the I.C.C. that "Top of tender behind fuel space shall be kept clean and means provided to carry off waste water."⁸³ This rule makes it arguable that the case really involved a matter of construction of the tender. Prior to the *Lilly* decision, other courts had refused to allow recovery under the Act based merely on the presence of foreign substances on the tender or locomotive.⁸⁴ In cases since *Lilly* the courts have generally followed this earlier line of decision and granted recovery only where the dangerous condition arose from defective construction⁸⁵ or was the result of a violation of a specific rule of the I.C.C.⁸⁶

The foregoing limitations on the Safety Appliance and Boiler Inspection Acts indicate that the courts have taken into consideration the practical problems of operating railroads within the terms of the Acts in determining the extent of obligation placed on the carrier. Largely the nature of the liability is to provide equipment which is mechanically

⁸² *Id.* at 487, 488. The jury had found, in answer to a special interrogatory, that there was no leak in the collar of the manhole as alleged by the plaintiff, so that there was no apparent mechanical defect present in the case.

⁸³ See 49 CODE FED. REGS. §91.153 (1949 ed.).

⁸⁴ *Ford v. New York, N.H. & H. R.R.*, 54 F. 2d 342 (2d Cir. 1931) (grease on handrail); *McGivern v. Northern Pac. Ry.*, 132 F. 2d 213 (8th Cir. 1942) (snow on step); *O'Dea v. Byram*, 176 Minn. 67, 222 N.W. 519 (1928) (dust and coal causing latch to stick); *Reeves v. Chicago, St. P., M. & O. Ry.*, 147 Minn. 114, 179 N.W. 689 (1920) (piece of coal on step); *Slater v. Chicago, St. P., M. & O. Ry.*, 146 Minn. 390, 178 N.W. 813 (1920) (misplaced bunker cover); *Zacharitz v. St. Louis-S.F. Ry.*, 336 Mo. 801, 81 S.W. 2d 608 (1935) (grease on handrail); *Riley v. Wabash Ry.*, 328 Mo. 910, 44 S.W. 2d 136 (1931) (misplaced clinker hook); *Tobin v. Detroit, T. & I. R.R.*, 57 Ohio App. 306, 13 N.E. 2d 739 (1937) (frost on step).

⁸⁵ See, e.g., *Raudebush v. Baltimore & O. R.R.*, 160 F. 2d 363, 366 (3d Cir. 1917); *Camp v. Atlantic Coast Lines R.R.*, 251 Ala. 184, 36 So. 2d 331 (1948) (recovery denied for grease on ladder where there was no defect in construction); *Banta v. Union Pac. R.R.*, 362 Mo. 421, 242 S.W. 2d 34 (1951) (icy condition held to be violation of Act if due to defective steam line).

⁸⁶ The reliance on the I.C.C. regulation in the *Lilly* case was made the distinguishing feature by the courts in *Raudenbush v. Baltimore & O. R.R.*, 160 F. 2d 363, 366 (3d Cir. 1947). *Camp v. Atlantic Coast Lines R.R.*, 251 Ala. 184, 189, 36 So. 2d 331, 335 (1948), and *Ehalt v. McCarthy*, 104 Utah 110, 138 P. 2d 639, 644 (1943). In *Banta v. Union Pac. R.R.*, 362 Mo. 241, 431, 242 S.W. 2d 34, 41 (1951), the court said that the Act itself contains the prohibition against the use of a tender not in proper condition and safe to operate, and apparently rejects the distinction made in the *Raudenbush*, *Camp* and *Ehalt* opinions. Note, however, that in the *Banta* case there was apparently evidence of a mechanical defect which created the hazardous condition, as distinguished from *Raudenbush*, *Camp* and *Ehalt*.

free from defects and which is adequate to perform the functions for which it is intended. In the case of couplings between the locomotive and tender, where the risk to be avoided originally appears relatively slight, the courts have not given the Acts literal interpretations which would increase considerably the burden of compliance on the carrier.

Second, even though the appliance or defect is the sort which the Acts are intended to regulate, the courts appear to have recognized a qualification of the "absolute" duty in terms of the appliance being required to function only "when operated in an ordinary and reasonable manner"⁸⁷ or words to that effect.⁸⁸ The language of some opinions apparently requiring that the appliances work "at all times" or "at any time,"⁸⁹ relates primarily to the question of whether the carrier may plead and prove in defense that it has used all reasonable care to supply adequate appliances.⁹⁰

Most of the opinions which have recognized a qualification of the duty imposed by the Safety Appliance Acts have had reference to the requirement that cars be equipped with couplers which will couple automatically upon impact. There have been indications that this does not

⁸⁷ *Popplar v. Minneapolis, St. P. & S.S.M. Ry.*, 121 Minn. 413, 416, 141 N.W. 798, 799 (1913), *aff'd*, 237 U.S. 369 (1915.)

⁸⁸ *Myers v. Reading Co.*, 331 U.S. 477, 483 (1947) ("in the normal, natural and usual manner"); *Didinger v. Pennsylvania R.R.*, 39 F. 2d 798, 800 (6th Cir. 1930) ("under normal operation"); *Chicago, M., St. P. & P. R.R., v. Linehan*, 66 F. 2d 373, 381 (8th Cir. 1933) ("usual and customary manner"); *Western & A. R.R. v. Gentle*, 58 Ga. App. 282, 290, 198 S.E. 257, 262-263 (1938), *cert. denied*, 305 U.S. 654 (1938); *St. Louis, S.W. Ry. v. Bounds*, 244 S.W. 1099, 1102 (Tex. Civ. App. 1922).

⁸⁹ *Philadelphia & R. Ry., v. Auchenbach*, 16 F. 2d 550, 552 (3d Cir. 1926); *Philadelphia & R. Ry. v. Eisenhart*, 280 Fed. 271, 276 (3d Cir. 1922); *Chicago, St. P., M. & O. Ry. v. Muldowney*, 130 F. 2d 971, 975 (8th Cir. 1942); *Thornson v. Minneapolis & St. L. R.R.*, 137 Iowa 1158, 1162, 175 N.W. 71, 73, 1919; *Alabama & V. Ry. v. Dennis*, 128 Miss. 298, 301, 91 So. 4, 5 (1922). In *Chicago, R.I. & P. Ry. v. Brown*, 229 U.S. 317, 320-321 (1912), the carrier conceded that it was subject to a duty to supply couplers which would work "at all times," and in *San Antonio & A.P. Ry. v. Wagner*, 241 U.S. 476, 484 (1915), the Court said that it need not determine whether the failure of the coupler "at any time" would sustain a charge that the Act had been violated. Both of these statements were noted and questioned in *Chicago, M., St. P. & P. R.R., v. Linehan*, 66 F. 2d 373, 381 (8th Cir. 1933).

⁹⁰ The court in *Philadelphia & R. Ry. v. Eisenhart*, 280 Fed. 271, 276 (3d Cir. 1922) said that prior cases had required that the appliance work "at all times" and cited *St. Louis, I.M. & S. Ry. v. Taylor*, 210 U.S. 281, 294, 295 (1908); *Chicago, B. & Q. Ry. v. United States*, 220 U.S. 559, 575, 576 (1911); *Delk v. St. Louis & S.F. R.R.*, 220 U.S. 580, 586, 587 (1911); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 43 (1916); and *United States v. Atchison, T. & S.F. Ry.*, 163 Fed. 517 (8th Cir. 1908). With the exception of the *Delk* case, none of the cases use that precise language, and the citations in all cases refer to passages where the court is passing on the question of whether use of reasonable care would satisfy the requirements of the statute.

mean that the coupling must occur on the first impact,⁹¹ and that it may not apply where the cars have not been operated at a proper speed or with proper force for coupling.⁹² Because of the necessity for rounding curves, some lateral side play in the drawbars is permissible,⁹³ and it appears that a carrier may avoid liability under the Act by establishing that the coupling was attempted at a place where the couplers would not normally be in line with one another.⁹⁴ Similarly, the failure of the "pinlift lever" or coupling lever to open the knuckles of the coupler is treated as a violation of the Act only where reasonable force has been exercised on the lever.⁹⁵ The three recent Supreme Court cases which established the "absolute" nature of the duty under the Act, all gave at least passing recognition to the fact that improper or unusual operation of the equipment would not result in a violation.⁹⁶ Where the alleged

⁹¹ See, *Western & A. R.R. v. Gentle*, 58 Ga. App. 282, 291, 198 S.E. 257, 263 (1938), *cert. denied*, 305 U.S. 654 (1938); *Ross v. Duluth, M. & I.R. Ry.*, 203 Minn. 312, 318, 281 N.W. 76, 80 (1938). An annotation in 16 A.L.R. 2d 654, 655 (1951) indicates that these cases may be in a minority relying on language in *Carter v. Atlantic & St. A. B. Ry.*, 338 U.S. 430, 433-434 (1949); *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96, 99 (1950); but as these cases contain language referring to a proper manner of operation and as the *Carter* case does not specifically reject the language of the *Gentle* opinion that failure to couple on the first impact does not conclusively establish violation, the weight to be given to the A.L.R. statement is not clear.

⁹² See, *Western & A. R.R. v. Gentle*, 58 Ga. App. 282, 295, 198 S.E. 257, 265 (1938).

⁹³ *Chesapeake & O. Ry. v. Arrington*, 126 Va. 194, 101 S.E. 415 (1919). See also, *Atlantic City R.R. v. Parker*, 242 U.S. 56, 59 (1916) in which Mr. Justice Holmes said, "Some lateral play must be allowed to drawheads."

⁹⁴ *Atlantic City R.R. v. Parker*, 242 U.S. 56 (1916); *Willett v. Illinois Central R.R.*, 122 Minn. 513, 142 N.W. 883 (1913); *Chesapeake & O. Ry. v. Arrington*, 126 Va. 194, 101 S.E. 415 (1919). Although a recent decision, *Hallada v. Great Northern Ry.*, 69 N.W. 2d 673, 681 (Minn. 1955), says that misalignment cannot be a defense, its references to prior cases including *Atlantic City R.R. v. Parker*, *supra*, indicate that the court may have been thinking in terms of an unreasonably large lateral side play and attempts at coupling where the track was relatively straight.

⁹⁵ See, *Chicago, M., St. P. & P. R.R., v. Linehan*, 66 F. 2d 373, 378-379 (8th Cir. 1933). *Cf. Stewart v. Southern R.R.*, 315 U.S. 283 (1942), where there was no direct evidence of any attempt to use the lever.

⁹⁶ *O'Donnell v. Elgin, J. & E. Ry.*, 338 U.S. 384, 393 (1949): "The defendant stressed evidence that in the switching operation the coupler broke concurrently with an emergency stop. Such evidence might be material on the question of negligence. But the Act certainly requires equipment that will withstand the stress and strain of all ordinary operation . . . including emergency stops." *Carter v. Atlanta & St. A. B. Ry.* 338 U.S. 430 434 (1949): ". . . the absence of a 'defect' cannot aid the railroad if the coupler was properly set and failed to couple on the occasion in question" and in a footnote: "See *Myers v. Reading Co.* 331 U.S. 477 483 (1947). Respondent conceded in opposing certiorari that 'the Safety Appliance Act was violated— . . . a coupling failed to couple on impact . . .' That statement is apparently abandoned now, for the argument is that Carter set the coupler improperly. On the record before us it is clear that this is a jury

violation relates to the brakes, the courts have also referred to the manner of operation.⁹⁷ And where a brakeman fell from a car when a grab iron against which he had braced his foot for better leverage in operating a hand brake gave way, the court pointed out that "use as a foot brace was a natural and not unusual use."⁹⁸ All of these cases indicate that while the courts will not recognize a defense of reasonable care, they may be willing to limit the obligations of the Acts to situations where the likelihood of injury from defective equipment is reasonably foreseeable.

The Boiler Inspection Act has also been qualified in some cases by distinguishing between dangerous conditions which are the normal incidents of railroad operations and those which are not normally encountered. For example, the presence of grease on handholds or footboards of locomotives and tenders has been treated as "a result of normal operations,"⁹⁹ and recovery denied on the ground that "the operation of a railroad is necessarily attended by some danger."¹⁰⁰ In *Banta v. Union Pacific R.R.*,¹⁰¹ the court reversed a judgment for an employee injured by a slip on an icy tender on the basis that the instructions would have permitted the jury to find for the plaintiff even though the icy condition arose from normal operations of the train rather than from a defective steam line. On the other hand, in *Reeves v. Chicago, St. P., M. & O. Ry.*,¹⁰² the court denied recovery to an employee injured by the presence of a piece of coal on a step because this was not considered to be "the result of the ordinary use of such instrumentalities" but the result of some unforeseen force. These decisions may indicate a further limitation of the broad language of *Lilly v. Grand Trunk Western Ry.*,¹⁰³ since there the ice should not have accumulated under "normal conditions", i.e. compliance with the

question." *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96, 99 (1950): "Of course this assumes that the coupler was placed in a position to operate on impact. Thus, if 'the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened,' the railroad had a good defense."

⁹⁷ See, *Spokane & I. R.R. v. Campbell*, 241 U.S. 497, 505 (1916); *Didinger v. Pennsylvania R.R.*, 39 F. 2d 798, 799 (6th Cir. 1930).

⁹⁸ *Swinson v. Chicago, St. P., M. & O. Ry.*, 294 U.S. 529, 532 (1935).

⁹⁹ *Camp v. Atlantic Coast Line R.R.*, 251 Ala. 184, 190, 35 So. 2d 331, 336 (1948); see also, *McGivern v. Northern Pac. Ry.* 132 F. 2d 213, 217 (8th Cir. 1942) (snow on step.)

¹⁰⁰ *Zachritz v. St. Louis-S.F. Ry.*, 336 Mo. 801, 807, 91 S.W. 2d 608, 611 (1935). *O'Dea v. Byram*, 176 Minn. 67, 222 N.W. 519 (1928), where recovery was denied under the Act for injuries resulting from latch not moving out of the way properly, might be explained in the same way since the latch may have become "stuck" by a collection of dust and pieces of coal which could be a normal consequence of operation.

¹⁰¹ 362 Mo. 421, 242 S.W. 2d 34 (1951).

¹⁰² 147 Minn. 115, 179 N.W. 689 (1920).

¹⁰³ 317 U.S. 481 (1943).

I.C.C. regulation requiring that provision be made for carrying off waste water, and yet the formation of ice was not an unforeseeable incident of railroad operation in view of that very regulation.

The foregoing discussion leads to the conclusion that in terming the duty under the Safety Appliance and Boiler Inspection Acts an "absolute" one, the courts are intending only to eliminate the question of whether failure to comply with the requirements of the Acts may be excused by a showing of reasonable care or reasonable efforts to supply safe equipment.¹⁰⁴ Yet in the process of determining whether there has been a failure to comply, the courts allow the consideration of what is normal operating procedure and what would be foreseeable results, both of which seem to be elements which are usually related to the problem of what is reasonable care.¹⁰⁵ The courts also leave the question of compliance to the jury in many cases¹⁰⁶ which may permit the introduction of more considerations of reasonableness. To this extent the distinction between the nature of duty imposed under these acts and under the FELA may be somewhat lessened.

It is also apparent that the scope of the safety acts is not overly broad. The Safety Appliance Acts are limited to specific types of appliances. The Boiler Inspection Act is limited to matters of construction, although most defects, insufficiencies or inadequacies of equipment would appear to fall within the terms of the Act. To this extent the scope of protection offered to the injured party is more limited than

¹⁰⁴ No amount of reasonable care may excuse a violation: *Louisville & Jeffersonville Bridge Co. v. United States*, 249 U.S. 534, 539 (1919); *St. Joseph & G.I. Ry. v. Moore*, 243 U.S. 311, 314 (1917); *Delk v. St. Louis & S.F. R.R.*, 220 U.S. 580, 586-587 (1911); *Lehigh Valley R. R. v. Beltz*, 10 F. 2d 74, 76-77 (2d Cir. 1925), *cert. denied*, 270 U.S. 641 (1925); *Chicago Junction Ry. v. King*, 169 Fed. 372, 376-377 (7th Cir. 1909), *aff'd*, 222 U.S. 222 (1911); *Missouri-K.-T. R.R. v. Ridgeway*, 191 F. 2d 363, 366 (8th Cir. 1951).

¹⁰⁵ The "reasonable man" test appears to be an evaluation of whether serious harm is foreseeable when a less harmful course of action is readily open. In relation to the Safety Appliance and Boiler Inspection Acts, once the serious harm of injury to an employee or other person is foreseeable, the less harmful course of action, *i.e.*, compliance, is always open. In imposing the "absolute" duty the courts seem only to be making the last part of this determination. It should be noted, however, that they also have eliminated the question of notice of the defect under the Acts, *United States v. Northern Pac. Ry.*, 287 Fed. 780, 783-784 (9th Cir. 1923); *Banta v. Union Pac. R.R.*, 362 Mo. 421, 429, 242 S.W. 2d 34, 40 (1951).

¹⁰⁶ See, *e.g.*, *Lilly v. Grand Trunk Western Ry.*, 317 U.S. 481 (1943); *Baltimore & O. R.R. v. Groeger*, 266 U.S. 521 (1925); *New Orleans & N.E. R.R. v. Scarlet*, 249 U.S. 528 (1919); *Spokane & I. R.R. v. Campbell*, 241 U.S. 497 (1916); *Western & A. R.R. v. Gentle*, 58 Ga. App. 282, 198 S.E. 257 (1938), *cert. denied*, 305 U.S. 654 (1938); *Poplar v. Minneapolis, St. P. & S.S.M. Ry.*, 121 Minn. 413, 141 N.W. 798 (1913), *aff'd*, 237 U.S. 369 (1915). *But cf.* *Atchison, T. & S.F. Ry. v. Scarlett*, 300 U.S. 471, 474 (1937) saying that courts and juries should not attempt to determine when there has been compliance if the I.C.C. has notice of the condition and fails to make any regulations with regard to it.

that found under the more general language of "negligence" in the FELA, which may cover not only negligence in supplying equipment, but lack of proper care in its operation, failure to give proper signals, failure to properly light yards, etc.

Proof of Breach

Closely related to the question of the duty owed by the carrier is the problem of proof of breach of that duty. Several of the cases already mentioned have raised specific problems of this sort.¹⁰⁷ Although the duties owed under the three acts are not identical, the types of proof which may be used are not so different. Sometimes proof of a breach of one of the safety acts is established by direct evidence of total absence of a required appliance such as a coupler, drawbar or running board,¹⁰⁸ the presence of a damaged appliance,¹⁰⁹ a specific defect in an air brake line or a steam line which creates an obvious hazard,¹¹⁰ an appliance which breaks down under usage,¹¹¹ or an appliance such as a pin lift lever which fails to open the coupler when operated in a normal fashion,¹¹² or misalignment of couplers.¹¹³ Likewise specific proof of non-compliance with I.C.C. regulations and rules is sufficient to establish a violation of

¹⁰⁷ See, *e.g.*, *O'Donnell v. Elgin, J. & E. Ry.*, 338 U.S. 384 (1949) (breaking of coupling); *Lilly v. Grand Trunk Western Ry.*, 317 U.S. 481 (1943) (presence of ice on tender top); *Western & A. R.R. v. Gentle*, 58 GaG. App. 282, 198 S.E. 257 (1937), *cert. denied*, 305 U.S. 654 (1938) (failure to couple); *Chesapeake & O. Ry. v. Arrington*, 126 Va. 194, 101 S.E. 415 (1919) (failure to double due to misalignment).

¹⁰⁸ See, *e.g.*, *Lang v. New York Cent. R.R.*, 255 455 (1921) (entire coupler assembling missing); *St. Joseph & G.I. Ry. v. Moore*, 243 U.S. 311 (1917) (grab-iron missing); *Great Northern Ry. v. Otos*, 239 U. S. 499 (1915) (pin lift lever missing); *Williams v. New York Cent. R.R.*, 403 Ill. 494, 84 N.E. 2d 399 (1948) (running board missing); *Cramer v. Chicago, M. & St. P. Ry.*, 134 Minn. 61, 158 N.W. 796 (1916) (ladder rung missing).

¹⁰⁹ See, *e.g.*, *Baltimore & O. R.R. v. Groeger*, 266 U.S. 521 (1925) (broken staybolts, not cause of explosion); *Chicago Junction Ry. v. King*, 169 Fed. 372 (7th Cir. 1909), *aff'd*, 222 U.S. 222 (1911) (broken knuckle); *Bocook v. Louisville & N. R.R.*, 67 F. Supp. 154 (E.D. Ky. 1946) (broken coupler); *Alabama, G. S. R.R. v. Smith*, 256 Ala. 220, 54 So. 2d 453 (1951) (loose petcock).

¹¹⁰ See, *e.g.*, *Coray v. Southern Pac. Co.*, 335 U.S. 520 (1949); *Compton v. Southern Pac. Co.*, 70 Cal. App. 2d 267, 161 P. 2d 40 (1940); *Banta v. Union Pac. R.R.*, 362 Mo. 421, 242 S.W. 2d 34 (1951).

¹¹¹ See, *e.g.*, *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10 (1938) (grab iron came loose); *Davis v. Wolfe*, 263 U.S. 239 (1923) (grab iron came loose); *Chicago & N.W. Ry. v. Bower*, 241 U.S. 470 (1916) (bursting lubricator glass); *El Paso & S.W. R.R. v. Vizard*, 211 U.S. 608 (1909) (rail slipped out of standard).

¹¹² See, *e.g.*, *Chicago, R.I. & P. Ry. v. Brown*, 229 U.S. 317 (1913); *Chicago M., St. P. & P. R.R. v. Linehan*, 66 F. 2d 373 (8th Cir. 1933).

¹¹³ See, *e.g.*, *Chicago, St. P., M. & O. Ry. v. Muldowney*, 130 F. 2d 971 (8th Cir. 1942) *cert. denied*, 317 U.S. 700 (1943); *Davis v. Michigan Cnt. R.R.*, 294 Ill. 355, 128 N.E. 539 (1920); *Willett v. Illinois Cent. R.R.*, 122 Minn. 513, 142 N.W. 883 (1913).

the Acts,¹¹⁴ although proof of compliance does not always make a complete defense.¹¹⁵ This specific proof under the safety acts is matched by similar proof of specific acts of negligence under the FELA, such as leaving a hatch open,¹¹⁶ or throwing a switch while the car on which the plaintiff is riding is crossing it,¹¹⁷ or failure to check or maintain proper water level in a boiler.¹¹⁸

Where there are specific provisions, such as the requirement of the use of the couplers which will couple automatically on impact¹¹⁹ or the use of efficient hand brakes,¹²⁰ the failure of these appliances to function efficiently is proof of violation of the statute.¹²¹ It is unnecessary to

¹¹⁴ See, e.g., *Lilly v. Grand Trunk Western Ry.*, 317 U.S. 481 (1943) (failure to keep top of fuel space clean); *Louisville & N. R.R. v. Stephens*, 294 Ky. 328, 182 S.W. 2d 447 (1944) (defective water gauge).

¹¹⁵ While compliance with the clearance regulations for ladders was sufficient to avoid liability under the Safety Appliance Act in *Atchison, T. & S.F. Ry. v. Scarlett*, 300 U.S. 471 (1932) and compliance with the requirements as to ladders and grab irons was sufficient in *Davis v. Manry*, 266 U.S. 401 (1925), apparently on the ground that the situation was such that if the conditions were in fact unsafe, the I.C.C. would have made that determination in setting up the regulations, the Supreme Court in *Shields v. Atlantic Coast Line R.R.*, 350 U.S. 318 (1956) and the Court of Appeals in *Bolan v. Lehigh Valley R.R.*, 167 F. 2d 934 (2d Cir. 1948) found that something more than compliance would be necessary. The court in the latter case said that compliance "did not relieve appellant of its duty under the Boiler Inspection Act to maintain all appurtenances of its engines 'in proper condition and safe to operate * * * that the same may be employed in the active service of such carrier without unnecessary peril to life or limb.' The Commission's regulation, . . . merely provides for the number, dimensions, location and manner of application of such steps. A step may comply with these directions and yet be in a highly dangerous condition because it is worn or bent . . . Accordingly, if an appurtenance conforms with the I.C.C. regulations but nevertheless violates the Act, the latter must control." 167 F. 2d at 936. It would appear that in requiring "secure" ladders, steps and grab irons, the Safety Appliance Act would also be violated even though there were compliance with the regulations of the I.C.C. On the problem of compliance with administrative regulations, see Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEXAS L. REV. 143, 157-157 (1949), reprinted in MORRIS, *STUDIES IN THE LAW OF TORTS*, 182, 200 (1953).

¹¹⁶ *Harlan v. Wabash Ry.*, 335 Mo. 414, 73 S.W. 2d 749 (1934).

¹¹⁷ *Hutchins v. Akron, C. & Y. R.R.*, 162 F. 2d 189 (6th Cir. 1947).

¹¹⁸ *Ehalt v. McCarthy*, 104 Utah 110, 138 P. 2d 639 (1943).

¹¹⁹ See, e.g., *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96 (1950); *Minneapolis & St. L. R.R. v. Gotschall*, 244 U.S. 66 (1917); *Spotts v. Baltimore & O. R.R.*, 102 F. 2d 160 (7th Cir. 1938); *Chicago, St. P., M. & O. Ry. v. Muldowney*, 130 F. 2d 971, 975 (8th Cir. 1942).

¹²⁰ See, e.g., *Myers v. Reading Co.*, 331 U.S. 477 (1947); *Spokane & I. R.R. v. Campbell*, 241 U.S. 497 (1916); *Didinger v. Pennsylvania R.R.*, 39 F. 2d 798 (6th Cir. 1930); *Campbell v. Pittsburgh & W. Va. R.R.*, 122 F. Supp. 749 (W.D. Pa. 1954).

¹²¹ As noted above, this assumes that the couplers have been placed in a position to operate, *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96, 99 (1950); *Hallada v. Great Northern Ry.*, 69 N.W. 2d 673, 680 (Minn. 1955), and that the attempt to operate the brakes is in the normal manner, *Spokane & I. R.R. v.*

show a specific defect in the appliance; if a coupler does not couple or does not remain coupled the act is violated whether the cause of failure is insufficiency of a pin lift lever, an overly stiff knuckle joint or a broken knuckle. Some of the courts have spoken of this type of situation as one in which something like "res ipsa loquitur" may be applied,¹²² but that term seems inappropriate. While it is true that an inference of lack of care may be drawn from the failure to function properly, "negligence" in the sense of lack of due care is irrelevant. These courts are really faced only with a question of whether the appliance was efficient, and proof of failure to function under normal circumstances is not merely circumstantial evidence being used to establish the ultimate fact of lack of care. This is in contrast to cases arising under the FELA, where res ipsa loquitur may appropriately be applied to establish negligence.¹²³ It should be noted, however, that the question of "control" of the instrumentality on the part of the carrier or on the part of the employee may be of importance in determining liability under the Safety Appliance Acts in some cases.¹²⁴

In cases involving more generalized requirements,¹²⁵ such as that Campbell, 241 U.S. 497, 505 (1916); *Didinger v. Pennsylvania R.R.*, 39 F. 2d 798, 799 (6th Cir. 1930).

¹²² See, e.g., *Minneapolis & St. L. R.R. v. Gotschall*, 244 U.S. 66, 67 (1917); *Didinger v. Pennsylvania R.R.* 39 F. 2d 798, 799-800 (6th Cir. 1930); *Eker v. Pettibone*, 110 F. 2d 451, 453-454 (7th Cir. 1940); *Colwell v. St. Louis-S.F. Ry.*, 335 Mo. 494, 504, 73 S.W. 2d 222, 226-227 (1934).

¹²³ See, e.g., *Jesionowski v. Boston & M. R.R.*, 329 U.S. 552 (1947); *Carpenter v. Batlimore & O. R.R.*, 109 F. 2d 375 (6th Cir. 1940); *Long v. Union Pac. R.R.*, 192 F. 2d 788 (8th Cir. 1951); *Ramsouer v. Midland Valley R.R.*, 135 F. 2d 101 (10th Cir. 1943); *Cochran v. Pittsburgh & L. R.R.* 31 F. 2d 769 (N.D. Ohio 1923); *Baltimore & O. S.W. R.R., v. Hill*, 84 Ind. App. 345, 148 N.E. 489 (1925), *cert. denied*, 273 U.S. 738 (1925); *Sibert v. Litchfield & M. R.*, 155 Mo. 68, 159 S.W. 2d 612 (1941). It is probably significant that the cases in which "res ipsa loquitur" language has been used in connection with the Safety Appliance Acts have also been within the terms of the FELA.

¹²⁴ In *Risberg v. Duluth, M. & I. R. Ry.*, 233 Minn. 396, 47 N.W. 2d 113 (1951), the court pointed out that a two day interval between delivery of the car by the carrier-defendant into the hands of the plaintiff's employer and the date of the accident prevented any inference of a defect at the time of delivery. Compare *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P. 2d 436 (1944), where proof of the type of care taken by persons handling a bottle which burst overcame this problem in a straight res ipsa loquitur case. On the other hand, *Eker v. Pettibone*, 110 F. 2d 451, 453-455 (7th Cir. 1940), recognizes that the "control" of the decedent engineer of the speed of the engine did not make him in control or responsible for the proper functioning of the pony truck (guide wheels on the locomotive) which jumped the track. In *Ehalt v. McCarthy*, 104 Utah 110, 138 P. 2d 639 (1943), the fact that Ehalt had been working with the boiler for some time before the explosion was considered a crucial fact. Cf. *Jesionowski v. Boston & M. R.R.*, 329 U.S. 452 (1947).

¹²⁵ See, *Fryer v. St. Louis-S.F. Ry.*, 333 Mo. 753-755, 63 S.W. 2d 47, 52-53 (1933) as to the distinction between the specific requirements of the Safety Appliance Acts and the more generalized requirements of the Boiler Inspection Act.

the locomotive, tender and all appurtenances shall be safe to operate without unnecessary peril to life or limb, the mere fact of an accident may not give rise to an inference of violation of the safety acts. Boiler explosions do occur from causes other than defective boilers such as an improper operation of an otherwise safe engine.¹²⁶ A fall from a ladder or car may give rise to an inference of a defect in construction or in one of the appliances, but may also have resulted from other causes such as ice or grease collecting on the car in the normal course of operations which is not a violation of the safety acts.¹²⁷ In such situations where there are equally probable explanations of the accident which do not involve violations of the Acts, the fact of accident is not treated as sufficient proof for liability. This same view of equal probabilities of non-negligent causes prevents the application of *res ipsa loquitur* in FELA cases.¹²⁸

EXTENT OF PROTECTION OFFERED—CARRIERS AFFECTED

In comparing the coverage of the three acts, it should be noted that all of them apply only to common carriers by railroad engaged in interstate commerce. This term has been interpreted fairly broadly, however, so as to include a terminal company which makes available facilities to other interstate carriers, makes up and breaks up trains and switches cars within the terminal yard;¹²⁹ a railroad operated wholly within the confines of the switch tracks of a single plant, but connecting with roads engaged in interstate commerce and carrying goods which move in interstate commerce;¹³⁰ and a railroad operating within a single state, free from any common management or control by other carriers, which transports articles of commerce shipped in continuous passage between the states.¹³¹ An express company having a contract with a railroad under

¹²⁶ *Fryer v. St. Louis-S.F. Ry.*, 333 Mo. 740, 63 S.W. 2d 47 (1933); *Ehalt v. McCarthy*, 104 Utah 110, 138 P. 2d 639 (1943).

¹²⁷ See, *e.g.*, *Camp v. Atlantic Coast Lines R.R.*, 251 Ala. 184, 36 So. 2d 331 (1948); *Banta v. Union Pac. R.R.*, 362 Mo. 421, 242 S.W. 2d 34 (1951); *Zachritz v. St. Louis-S.F. Ry.*, 336 Mo. 801 81 S.W. 2d 608 (1935).

¹²⁸ See, *e.g.*, *O'Mara v. Pennsylvania R.R.*, 95 F. 2d 762 (6th Cir. 1938); *Wadiak v. Illinois Cent. R.R.*, 208 F. 2d 925 (7th Cir. 1953); *Dade v. Boston & M. R.R.*, 92 N.H. 294, 20 A. 2d 485 (1943); *Waller v. Northern Pac. Terminal Co.*, 178 Ore. 274, 166 P. 2d 488 (1946), *cert. denied*, 329 U.S. 742 (1946).

¹²⁹ See, *e.g.*, *United States v. California*, 297 U.S. 175 (1936); *Fort Street Union Depot Co. v. Hillen*, 119 F. 2d 307 (6th Cir. 1941); *Belt Ry. Co. of Chicago v. United States*, 168 Fed. 542 (7th Cir. 1909); *Maurice v. State*, 43 Cal. App. 2d 270, 110 P. 2d 796 (1941).

¹³⁰ *Kenna v. Calumet, H. & S.E. R.R.*, 284 Ill. 301, 120 N.E. 259 (1918); *Devine v. Chicago & C.R. R.R.*, 259 Ill. 449, 102 N.E. 803 (1913).

¹³¹ *United States v. Colorado & N.W., R.R.*, 157 Fed. 321 (8th Cir. 1907); *Pacific Coast R.R. v. United States*, 173 Fed. 448 (9th Cir. 1909). *But see*, *United States v. Geddes*, 131 Fed. 452 (6th Cir. 1904), where carriage of interstate freight was done by the intrastate railroad on separate bills of lading and with separate charges and the court found that it was not within the terms of the Acts.

which the railroad supplied the cars to be used by the express company was not considered a common carrier by railroad within the terms of the Acts, on the ground that it did not in fact operate the trains.¹³² On the other hand, the lessor of a line engaged in interstate traffic has been held a proper defendant even though it has nothing to do with the actual operation of the railroad.¹³³

PERSONS COVERED

The persons who may bring an action under the FELA are limited to employees of the carrier or their personal representatives.¹³⁴ The courts have limited the category of "employees" to those in the relation of servants to the carrier, *i.e.*, those whom the carrier has the right to control as to the manner in which work is done.¹³⁵ As a result, an individual employed by a construction company which has contracted with a carrier to do repair work on its lines with the company having personal supervision of the work is not within the FELA.¹³⁶ Employees of a lessee or licensee of a track are not thereby employees of the owner so that it may be held responsible for injuries.¹³⁷ Express clerks or others employed on express or mail cars carried by rail are not employees of the carrier if under the supervision of the express company or the U. S. Post Office itself.¹³⁸ Where the Pullman Company operated Pullman cars on its own, although they were carried on the regular trains, the porter was not treated as an employee of the carrier;¹³⁹ but where the Pullman cars were owned and operated by an association including both the Pullman Company and the carriers, the porters were treated as employees.¹⁴⁰ The fact that the injured individual is nominally employed by an independent contractor may not prevent his being within the protection of the FELA if he is in fact subject to direction by the railroad

¹³² Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1929); Latsko v. National Carloading Corp., 192 F. 2d 905 (6th Cir. 1951).

¹³³ North Carolina R.R. v. Zachary, 232 U.S. 248 (1914).

¹³⁴ Act of April 22, 1908 §1, 45 U.S.C. §51 (1952 ed.) It should be noted that personal representatives may maintain the action only for the benefit of the surviving spouse or children of the employee.

¹³⁵ Dougall v. Spokane, P. & S. Ry., 207 F. 2d 843, 846 (9th Cir. 1953), *cert. denied*, 347 U.S. 904 (1954); Illinois Cent. R.R. v. Johnston, 205 Ala. 1, 7, 87 So. 866, 871-872 (1920), *cert. denied*, 254 U.S. 654 (1921).

¹³⁶ Dougall v. Spokane, P. & S. Ry., 207 F. 2d 843 (9th Cir. 1953), *cert. denied*, 347 U.S. 904 (1954); Norman v. Spokane, P. & S. Ry., 101 F. Supp. 305 (D. Ore. 1950), *aff'd*, 192 F. 2d 1020 (9th Cir. 1951), *cert. denied*, 342 U.S. 945 (1952).

¹³⁷ Hull v. Philadelphia & R. Ry., 252 U.S. 475 (1920); Chicago & A. R.R. v. Wagner, 239 U.S. 452 (1915); Griffith v. Gardner, 358 Mo. 859, 217 S. W. 2d 519 (1949); Robertson v. Yazoo & M. V. Ry., 159 F. 2d 31 (5th Cir. 1947).

¹³⁸ Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920); Norfolk & W. Ry. v. Hall, 57 F. 2d 1004 (4th Cir. 1932); Jones v. New York Cent. R.R., 182 F. 2d 326 (6th Cir. 1950), *cert. denied*, 340 U.S. 850 (1950).

¹³⁹ Robinson v. Baltimore & O. R.R., 237 U.S. 84 (1915).

¹⁴⁰ Oliver v. Northern Pac. Ry., 196 Fed. 432 (E.D. Wash. 1912).

or its agents at the time of injury.¹⁴¹ Where a car and its crew were loaned from one company to another, the crew members became employees of the borrowing company for the purposes of the Act.¹⁴² Individuals who are not in fact paid by the carrier, but who are called upon to assist trainmen in emergencies or unusual situations have been treated as employees.¹⁴³

While the preambles to the Safety Appliance and Boiler Inspection Acts refer only to "employees and travelers upon railroads", the Acts have been applied to cover not only employees of the carrier whose equipment causes the injury, but employees of shippers,¹⁴⁴ independent contractors,¹⁴⁵ and employees of other carriers engaged in inspecting the car before its acceptance by the carrier.¹⁴⁶ Not only have travelers on the railroads been granted recovery,¹⁴⁷ but persons travelling on the highways who become involved in collisions with defectively equipped trains have recovered under the Acts.¹⁴⁸

The distinction in coverage between the Acts is also apparent from the requirement that in order to recover under the FELA the plaintiff must show that the accident occurred while the employee was engaged in interstate commerce. Before 1939, the courts had broadened the scope of the Act somewhat by finding that if the employee's work was a necessary part of the whole operation called "interstate commerce" he

¹⁴¹ *Cimorelli v. New York Cent. R.R.*, 148 F. 2d 575 (6th Cir. 1945); *Downs v. Baltimore & O. R.R.*, 345 Ill. App. 118, 102 N.E. 537 (1951); *Benjamin v. Pennsylvania R.R.*, 112 N.Y.S. 2d 824 (1952).

¹⁴² *Linstead v. Chesapeake & O. Ry.*, 276 U.S. 28 (1929).

¹⁴³ *Baltimore & O. S. W. R.R., v. Burtch*, 263 U.S. 540 (1924) (owner helping to unload heavy equipment); *O'Neal v. Vie* 94 Okla. 68, 220 Pac. 853 (1923) (bystander assisting in wreck situation).

¹⁴⁴ *Rush v. Thompson*, 356 Mo. 568, 202 S.W. 2d 800 (1947). In *Paul v. Duluth, M. & I.R. Ry.*, 96 F. Supp. 578 (D. Minn. 1950), and *Risberg v. Duluth, M. & I.R. Ry.*, 233 Minn. 396, 47 N.W. 2 113 (1951), recovery was denied on the ground that the cars were not being used or hauled on the line of the defendant, but had they been so used or hauled the fact that the plaintiffs were employees of a quarry company to whom the cars were being delivered apparently would not have barred recovery. In *Floyd v. Thompson*, 356 Mo. 250, 201 S.W. 2d 390 (1947) recovery was denied not on the basis that the shipper was not a person within the scope of protection but on the basis of contributory negligence.

¹⁴⁵ *Shields v. Atlantic Coast Line R.R.*, 350 U.S. 318 (1956).

¹⁴⁶ *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10, (1938). In *Patton v. Baltimore & O. R.R.*, 197 F. 2d 732 (3d Cir. 1952), the employee of the receiving carrier was denied recovery on the ground that the car was not being used or hauled on the defendant's lines, and distinguished the *Brady* case on this ground.

¹⁴⁷ *Jacobson v. New York, N.H. & H. R.R.*, 206 F. 2d 153 (1st Cir. 1953); *Sérabic v. Cincinnati, N. O. & T. P. R.R.*, 42 Ohio App. 473, 182 N.E. 528 (1932).

¹⁴⁸ *Fairport, P. & E. R.R. v. Meredith*, 292 U.S. 589 (1934); *Scott v. Chicago, R. I. & P. Ry.*, 197 F. 2d 259 (8th Cir. 1952); *Brown v. Chicago, R. I. & P. Ry.*, 108 F. Supp. 164 (N. D. Iowa 1952).

might recover.¹⁴⁹ For example, a switchman who moved a string of cars so that an interstate carload of hogs was placed on the proper track for forwarding after a temporary delay was held within the act,¹⁵⁰ though moving of an empty car after an interstate movement in the course of returning it to the owner was held not to bring the employee within the FELA.¹⁵¹ Where plaintiff was employed in alteration and repair of bridges and tracks used in interstate commerce, the Supreme Court said that he was so closely related to the conduct of commerce that he was protected.¹⁵² And in 1939 all doubt was removed as to the extent of protection, when the FELA was amended to include as "employees engaged in interstate commerce":

Any employee of a carrier, any part of whose duties as such employee shall be in the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, effect such commerce.¹⁵³

Or as one early case put it: "Was the relation of the employment . . . to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce?"¹⁵⁴ Contrasted with these requirements of some relation to interstate commerce under the FELA are the current provisions of the Safety Appliance and Boiler Inspection Acts which apply to all cars whether used in interstate or intrastate commerce.¹⁵⁵

¹⁴⁹ *Pedersen v. Delaware, L. & W. R.R.*, 299 U.S. 146, 152 (1913).

¹⁵⁰ *Leuthe v. Erie R.R.*, 12 F. Supp. 161 (W.D.N.Y. 1935).

¹⁵¹ *Ewing v. Coal & Coke Ry.*, 82 W. Va. 427, 96 S.E. 73 (1918).

¹⁵² *Pedersen v. Delaware, L. & W. R.R.*, 299 U.S. 146, (1913).

¹⁵³ Act of August 11, 1939, s 1, 45 U.S.C. §51 (second paragraph) (1952 ed.)

¹⁵⁴ *Lamphere v. Oregon R. & N. Co.*, 195 Fed. 336, 340 (9th Cir. 1912).

¹⁵⁵ The 1903 Safety Appliance Act referring to "all trains, locomotives, tenders, cars and similar vehicles used" has been interpreted as applying the provisions of the Safety Appliance Acts to intrastate commerce, *Gilvary v. Cuyahoga Valley Ry.*, 292 U.S. 57 (1934); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916); *Southern Ry. v. United States*, 222 U. S. 20 (1911).. The 1924 rewording of the Boiler Inspection Act, Act of June 7, 1924, §2, 45 U.S.C. §23 (1952 ed.) which dropped all reference to the fact that the locomotives covered were those used "in moving interstate or foreign traffic" seems not to have received much attention from the courts, perhaps because it was already well established that Congress had the power to make safety requirements for carriers engaged in interstate commerce which would apply to intrastate cars, see *Southern Ry. v. United States*, *supra*, and *Texas & Pac. Ry. v. Rigsby*, *supra*. State statutes attempting to set up safety requirements similar to those of the Boiler Inspection Act and the I.C.C. regulations under it have been declared invalid as in conflict with the federal requirements, *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926), but outside of such conflict, state regulation has been permitted, *Terminal R.R. Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943) See also, *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *Vandalia R.R. v. Public Service Comm'n*, 242 U.S. 255 (1916) *Atlantic Coast Line R.R. v. Georgia*, 234 U.S. 280, 290 (1914), upholding state legislation, and *Pennsylvania R.R. v. Public Service Comm'n*, 250 U. S. 566 (1919); *Southern Ry. v. Railroad Comm'n of Indiana*, 236 U.S. 439 (1915), overthrowing legislation in conflict with federal legislation.

USED OR HAULED ON ITS LINES

A requirement does exist as to the Safety Appliance and Boiler Inspection Acts which bears some resemblance to that of the FELA regarding injuries in interstate commerce, namely that the car or locomotive must be used or hauled on the line of the carrier. Under such provisions, which vary in terminology from one section to another,¹⁵⁶ cars which have been placed in repair shops or on heavy repair tracks are generally treated as not "in use."¹⁵⁷ On the other hand, a car which has been found to be defective and has been placed on a side track to be sent to a repair yard apparently remains "in use" until it in fact reaches the ultimate point of repair.¹⁵⁸ Also where a car has been moving in interstate commerce and is undergoing light repairs on a main or switch track, it has been held to remain "in use."¹⁵⁹ A car standing on a siding between two interstate trips has not been withdrawn from use,¹⁶⁰ and if it is loaded with interstate freight the fact that it may be placed on a side track for repair purposes does not take it out of use.¹⁶¹ These cases illustrate that, as the courts extended the interstate commerce requirements of FELA, so they have given a broad interpretation to this requirement of the safety acts.

¹⁵⁶ The language used in the various sections is as follows: 45 U.S.C. §1 "to use on its line, . . . to run any train"; §2 "to haul or permit to be hauled or used on its line"; §4 "to use"; §5 "shall be used"; §6 "running any train, or hauling or permitting to be hauled or used on its line any car"; §7 "in use . . . the unlawful use"; §8 "used on any railroad . . . used in connection"; §9 "any train is operated"; §11 "to haul, or permit to be hauled or used on its line"; §13 "hauling, or permitting to be used or hauled on its line" . . . "such movement or hauling or hauling . . . the movement or hauling"; §23 "to use or permit to be used on its line".

¹⁵⁷ *E.g.*, *Sherry v. Baltimore & O. R.R.*, 30 F. 2d 487 (3d Cir. 1929); *Baltimore & O. R.R. v. Hooven*, 297 Fed. 919 (6th Cir. 1924); *Kaminski v. Chicago, M., St. P. & P. R.R.*, 190 Minn. 519, 231 N.W. 189 (1930). Apparently even preparation for sending the locomotive out is not treated as "use" since in both *Baltimore & O. R.R. v. Hooven*, *supra*, and *Harlan v. Wabash Ry.*, 335 Mo. 414, 73 S.W. 2d 749 (1934) the locomotive was on the "go out" track in preparation for departing.

¹⁵⁸ *E.g.*, *Chicago Great Western R.R. v. Schendel*, 267 U.S. 287 (1925) *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916). It is for this reason that in spite of some doubts expressed in *Lang v. New York Cent. R.R.*, 255 U.S. 455, 458 (1921), the defective car in *St. Louis & S.F. R.R. v. Conarty*, 238 U.S. 243 (1915), which was standing on the line waiting to be switched onto an isolated track to await repairs, was "in use on the line."

¹⁵⁹ *Minneapolis, St. P. & S.S.M. Ry. v. Goneau*, 269 U.S. 406 (1926); *Chicago Junction Ry. v. King*, 169 Fed. 372 (7th Cir. 1909), *aff'd* 222 U.S. 222 (1911); *Chicago, M. & St. P. Ry. v. Voelker*, 129 Fed. 522 (8th Cir. 1904); *Blazin v. Southern Pac. Co.*, 127 F. Supp. 20 (N.D. Cal. 1954).

¹⁶⁰ *Johnson v. Southern Pac. Co.*, 196 U. S. 1 (1904); *Fort Street Union Depot Co. v. Hillen*, 119 F. 2d 307 (6th Cir. 1941); *Johnson v. Great Northern Ry.*, 179 Fed. 643 (8th Cir. 1910).

¹⁶¹ *Great Northern Ry. v. Otos*, 239 U.S. 349 (1915); *Delk v. St. Louis & S.F. R.R.*, 220 U.S. 580 (1911).

In addition to the question of whether the car is in use, the requirement of the safety acts is satisfied only if it is in use on the defendant carrier's lines. For example, in *Brady v. Wabash R.R.*,¹⁶² an inspector for the Wabash R.R. was injured while examining cars which had not yet been accepted by his company. He was denied recovery on the ground that these cars were not yet in use on the Wabash line. However, he then was able to go against the delivering carrier and recover on the ground that until acceptance, the cars were in use on its line.¹⁶³ Where a car in the possession of the Boston & Maine R.R. was being uncoupled from another car which the Canadian Pacific Ry. was picking up, it was treated as "in use" by Canadian Pacific even though it had not been accepted for carriage by that line.¹⁶⁴ On the other hand, once a car has been accepted by a second carrier¹⁶⁵ or a shipper¹⁶⁶ the courts are apt to treat it as not "in use" on the first carrier's line. There are some exceptions to this: where a car was being unloaded on a government siding over which the carrier had an exclusive right to operate trains, the siding was treated as part of the main line;¹⁶⁷ where a car had been unloaded on a private industry track and was being switched off this track by the carrier's employees, it was treated as in effect being used on the defendant's line;¹⁶⁸ where a car was delivered to a shipper on a spur attached to the carrier's lines, the shipper was treated as under the Safety Appliance Act;¹⁶⁹ and where an independent contractor was employed to unload gasoline by the consignee while the tank car was sitting in freight yards, he was allowed to recover under the Safety Appliance Act.¹⁷⁰ The latter two cases may be distinguished from the others on the ground that the car was not in the hands of one who owned the track nor one who normally operated trains over the track, and

¹⁶² 329 Mo. 1123, 49 S.W. 2d 24 (1932), *cert. denied*, 287 U.S. 619 (1932).

¹⁶³ *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10 (1938).

¹⁶⁴ *Cusson v. Canadian Pac. Ry.*, 115 F. 2d 430 (2d Cir. 1940). It should be noted that when the statute refers to use on "its line," the courts interpret this to cover operations on the tracks belonging to another carrier. *United States v. New York Cent. R. R.*, 70 F. Supp. 761 (N.D.N.Y. 1946); *Hood v. Baltimore & O. R.R.*, 302 Mo. 609, 259 S.W. 471 (1924). *Cf. Texas & Pac. Ry. v. United States*, 189 F. 2d 749 (8th Cir. 1951).

¹⁶⁵ *Patton v. Baltimore & O. R.R.*, 197 F. 2d 832 (3d Cir. 1952). But operation by an "agent" on its lines may be within the provisions of the acts, see *Hood v. Baltimore & O. R.R.*, 302 Mo. 609, 259 S.W. 471 (1924).

¹⁶⁶ *Paul v. Duluth, M. & I.R. Ry.*, 96 F. Supp. 578 (D. Minn. 1950); *Risberg v. Duluth, M. & I. Ry.*, 233 Minn. 396, 47 N.W. 2d 113 (1951).

¹⁶⁷ *Rush v. Thompson*, 356 Mo. 568, 202 S.W. 2d (1947).

¹⁶⁸ *Geraghty v. Lehigh Valley R.R.*, 70 F. 2d 300 (2d Cir. 1934); *Gray v. Louisville & N. R.R.*, 197 Fed. 874 (C.C.E.D. Tenn. 1912); *Lovett v. Kansas City Terminal Ry.*, 316 Mo. 1246, 295 S.W. 89 (1927); *Cf. Sprankle v. Thompson*, 243 S.W. 2d 510 (Mo. 1951) (track was constructed by carrier and it appears to have been the only company operating trains over it).

¹⁶⁹ *Floyd v. Thompson*, 356 Mo. 250, 201 S.W. 2d 390 (1947).

¹⁷⁰ *Shields v. Atlantic Coast Line R.R.*, 350 U.S. 318 (1956).

therefore the car may remain in use on the main line even though control has passed into the hands of others than the carrier.

The distinction which the courts have apparently drawn between some sidings which are treated as part of the main line of the defendant, and shipper's tracks which are treated as different from the defendant carrier's lines, has been criticised on the ground that in either case the railroad is in the best position to inspect and insure that the equipment is safe within the meaning of the acts.¹⁷¹ It is true that the primary purpose of the acts, as interpreted by the courts to impose an absolute duty, is to compel the carrier to make proper inspections and supply proper equipment. It seems arguable, however, that to impose such a duty where the car involved has in fact passed out of the hands of the carrier and into the hands of some other operator who may make inspections as easily as the carrier, and who may in fact have caused the damage to the equipment, is to go beyond the objectives of the acts. At least the cases seem to so indicate.¹⁷²

Causal Relation

There is little question but that in order to recover under any of the three acts, the plaintiff must show that in fact there is some causal relation between the violation of the act (either in terms of supplying or using defective equipment or in terms of negligence action or inaction) and the injuries which he has suffered.¹⁷³ The courts require something more than a mere showing that but for the violation the injury could not have occurred, i.e. that the violation must have been "a substantial factor" in producing the injury.¹⁷⁴ Although the Supreme Court's decision in *Coray v. Southern Pacific Co.*¹⁷⁵ might at first appear to reject

¹⁷¹ Louisell and Anderson, *The Safety Appliance Act and the FELA: A Plea for Clarification*, 18 LAW & CONTEMP. PROB. 281, 285-288 (1953).

¹⁷² *Patton v. Baltimore & O. R.R.*, *supra* note 165, *Paul v. Duluth, M. & I.R. Ry.*, *supra* note 166, and *Risberg v. Duluth, M. & S.R. Ry.*, *supra* note 166. It should be pointed out that in the cases involving injuries on shipper's sidings, with the exception of the *Rush* and *Floyd* cases, *supra* notes 167, 169. the injuries appear to have occurred to employees of the carrier who were engaged in switching the cars as part of the interstate transportation of the cars. *Rush* seems to be treated as exceptional by the later cases in view of the fact that the carrier was the only person authorized to operate as a carrier over the lines. In *Floyd*, the carrier seems to have conceded that it was subject to the Act and argument centered on the problem of contributory negligence.

¹⁷³ See, *Coray v. Southern Pac. Co.*, 335 U.S. 520 (1949) (Safety Appliance Acts); *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29 (1944) (FELA); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1942) (Boiler Inspection Act).

¹⁷⁴ *Johnson v. Chicago, Great Western Ry.*, 64 N.W. 2d 372 (Minn. 1954). That the cause must be "proximate" has been recognized under all of the acts: *Tennant v. Peoria & P. U. Ry.*, 321 U.S. 29 (1944); *Davis v. Wolfe*, 263 U.S. 239 (1923); *Chesapeake & O. Ry. v. Wells*, 49 F. 2d 251 (6th Cir. 1931); *Alabama Great Southern Ry. v. Smith*, 256 Ala. 220, 54 So. 2d 453 (1951).

¹⁷⁵ 335 U.S. 520 (1949).

this requirement, a closer analysis indicates that the Court is not so much rejecting the "substantial factor" test as it is saying that the meaning of that term must be interpreted in the light of a Congressional intention to grant protection to employees. Therefore, where defective equipment caused the train to stop suddenly, which in turn produced a collision between the motor car upon which the decedent was riding and the stalled train, it could not be said as a matter of law that no substantial connection existed between the violation of the Safety Appliance Act and the death of the plaintiff's decedent.

It might be argued that there is some distinction between the requirements of causal relation under the FELA and the requirements under the safety acts taken alone, since the former refer to injuries resulting "in whole or in part" from negligence,¹⁷⁶ while the latter contain no such language and are interpreted as subject to state law where not combined with the FELA¹⁷⁷ and the state law may include rules as to proximate cause.¹⁷⁸ It is true that under the FELA the courts have made it clear that the negligence of the carrier, its officers, agents and employees need not be the sole cause of injury but that it is sufficient that such negligence contributes substantially to the injury.¹⁷⁹ But in one of the non-FELA cases arising under the Safety Appliance Acts, the court made it clear that there might be more than a single "proximate cause" of an injury, and that either of two contributing causes might be treated as proximate,¹⁸⁰ a view which seems to be generally accepted today.¹⁸¹

Related to the problem of whether the violation of the duty imposed upon the carrier was a substantial factor in producing injury is the question of an intervening cause which may or may not be treated as sufficiently independent of the violation to prevent a finding of "proximate cause." Here the acts of the injured party himself become relevant. Under the FELA, contributory negligence is never a complete bar to recovery, and in the case of violation of the safety acts is not considered at all.¹⁸² The plaintiff cannot be prevented from recovering so long as the jury finds that the negligence of the carrier is a con-

¹⁷⁶ Act of April 22, 1908, §1, 45 U.S.C. §51 (1952 ed.).

¹⁷⁷ *Moore v. Chesapeake & O. Ry.*, 291 U. S. 205, 214-215 (1934); *Gilvary v. Cuyahoga Valley Ry.*, 202 U.S. 57, 61-62 (1934).

¹⁷⁸ See *Louisell and Anderson, The Safety Appliance Act and the FELA: A Plea for Clarification*, 13 LAW & CONTEMP. PROB. 281, 283 (1953). But note that such cases as *Louisville & N. R.R. v. Layton*, 243 U.S. 617 (1917) and *Lang v. New York Cent. R.R.*, 255 U.S. 455 (1921) in which the Supreme Court purports to lay down rules of "proximate cause" for actions under the safety acts, were in fact not within the terms of the FELA.

¹⁷⁹ *Eglsaer v. Scandarett*, 151 F. 2d 562, 565-566 (7th Cir. 1945); *Bocook v. Louisville & N. R.R.*, 67 F. Supp. 154, 156-157 (E.D. Ky. 1946).

¹⁸⁰ *Floyd v. Thompson*, 356 Mo. 250, 255-256, 201 S.W. 2d 390, 393 (1947).

¹⁸¹ See, *PROSSER, TORTS* 222, 254-255 (2d Ed. 1955).

¹⁸² Act of April 22, 1908, §3, 45 U.S.C. §53 (1952 ed.).

tributing factor,¹⁸³ but if the plaintiff's own acts are sufficiently unrelated to the negligence or violation of the safety acts, the court may treat it as the sole cause of injury and deny recovery.¹⁸⁴ It appears that where the plaintiff's acts are stimulated by the defective condition of the equipment, the courts are unlikely to find them to be the sole cause of injury.¹⁸⁵ If the action cannot be brought within the terms of the FELA, contributory negligence may remain as a defense under the Safety Appliance and Boiler Inspection Acts¹⁸⁶ and may therefore bar recovery without reference to whether plaintiff's acts constitute "a superseding cause."

The acts of third parties may be treated as superseding causes. Although the FELA speaks in terms of injuries resulting "in whole or in part" from negligence, the courts have recognized the doctrine of superseding causes.¹⁸⁷ In an action under the Safety Appliance Acts, the court refused recovery where the insecure nature of the step was due to the acts of a third party.¹⁸⁸ Although the defense of the "fellow servant" doctrine may not be available as such under these acts¹⁸⁹ it would appear that if the fellow servant's acts were such as to constitute a superseding cause, liability under the safety acts would be cut off.¹⁹⁰

It appears, therefore, that so far as actual causal relation is concerned there is no serious or substantial difference between the requirements of the different acts.

¹⁸³ See, e.g., *Philadelphia & R. Ry. v. Achenbach*, 16 F. 2d 550, (3rd Cir. 1926); *McCarthy v. Pennsylvania R.R.*, 156 F. 2d 877 (7th Cir. 1946); *Hallada v. Great Northern Ry.*, 69 N.W. 2d 673 (Minn. 1955); *Southern Pac. Co. v. Thomas*, 21 Ariz. 355, 138 Pac. 268 (1920), *cert. denied*, 255 U.S. 576 (1921).

¹⁸⁴ See, e.g., *Southern Ry. v. Peters*, 194 Ala. 94, 69 So. 611 (1915); *Powell v. Waters*, 55 Ga. App. 307, 190 S.E. 615 (1937). See also *Galveston, H. & S.A. Ry. v. Kurtz*, 147 S.W. 658, 660 (Tex. Civ. App. 1912).

¹⁸⁵ *Erie R.R. v. Caldwell*, 46 F. 2d 50 (6th Cir. 1931); *Minneapolis St. P. & S.S.M. Ry. v. Goneau*, 264 Fed. 947 (6th Cir. 1920); *Alabama Great Southern R.R. v. Smith*, 256 Ala. 220, 54 So. 2d 453 (1951).

¹⁸⁶ See discussion of contributory negligence as a defense to these acts, *infra* pp. 530-533.

¹⁸⁷ See, e.g., *Morse v. Pennsylvania R.R.* 74 F. 2d 677 (2d Cir. 1935); *Powell v. Edwards*, 117 Fla. 114, 157 So. 427 (1934); *Ward v. Southern Ry.*, 206 N.C. 530, 174, S.E. 443 (1934); *Paris & G. N. Ry. v. Stafford*, 53 S.W. 2d 1019 (Tex. Comm. App. 1932); *Fort Worth & D. C. Ry. v. Rowe*, 69 S.W. 2d 169 (Tex. Civ. App. 154).

¹⁸⁸ *Slater v. Chicago, St. P., M. & O. Ry.*, 146 Minn. 390, 178 N.W. 813 (1920).

¹⁸⁹ See discussion of this defense below pp. 533-534.

¹⁹⁰ In *Johnson v. Chicago Great Western Ry.*, 64 N.W. 2d 372 (Minn. 1954) the break in the coupling apparatus was not held to be a substantial factor, but the question of whether the action of the conductor was not substantial was left to the jury. It would appear that the latter might be called an intervening and superseding act. It also seems possible that under the Boiler Inspection Act the negligent operation of the boiler by the employees of the railroad might be superseding causes cutting off liability for use on the line of a boiler which proves unsafe due to lack of proper water.

NATURE OF ACCIDENT OR INJURY

In addition to the question of causal relation mentioned above, the courts also talk of "proximate cause" when they are dealing with the scope of the risk for which the carrier should be liable if it violates the safety acts. Inasmuch as the obligation imposed by the federal statutes is uniformly treated as a matter of federal law,¹⁹¹ it is not too surprising that the leading cases in this area make no particular discrimination between FELA and non-FELA situations, although the courts are equally clear that the safety acts do not create a separate federal cause of action.¹⁹²

The general view with regard to civil liability based upon a violation of a statutory duty is that the only injuries which should be treated as "proximately caused" by such violation are those which the statute was intended to prevent,¹⁹³ with some tendency upon the part of the courts to read the statutory purpose rather narrowly.¹⁹⁴

Since the major evils to be avoided by the Safety Appliance Acts were injuries resulting from brakemen having to go onto the cars in order to control brakes and injuries resulting from employees going between the cars in the process of coupling and uncoupling,¹⁹⁵ it is not too surprising to find that the courts have thought in terms of limiting recovery to injuries resulting from these types of conduct. In *St. Louis & San Francisco R.R. v. Conarty*,¹⁹⁶ for example, the employee was riding a switch engine which collided with a loaded freight car lacking coupler and drawbar and he was crushed between the two, although had the freight car been properly equipped there would have been sufficient space to avoid such crushing. The Supreme Court reversed judgment for the plaintiff, pointing out that the purpose of the requirement of

¹⁹¹ *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205 (1934); *Jacobson v. New York, N. H. & H. Ry.*, 206 F. 2d 153, 157 (1st Cir. 1953).

¹⁹² *Gilvary v. Cuyahoga Valley Ry.*, 292 U.S. 57 (1934); *Jacobson v. New York, N.H. & H. R.R.*, 206 F. 2d 153, 156-157 (1st Cir. 1953).

¹⁹³ See, *MORRIS, TORTS* 180 (1953); *PROSSER, TORTS* 155 (2d Cir. 1955).

¹⁹⁴ The leading case on this point appears to be *Gorris v. Scott*, L.R. 9 Ex. 125 (1874), where the plaintiff's sheep were washed overboard and lost due to defendant-shipowner's failure to comply with an order pursuant to the Contagious Diseases (Animals) Act requiring that animals shipped to Great Britain from abroad should be confined in pens. The Court of Exchequer interpreted the Act and order as designed to prevent the exposure of animals to disease rather than to prevent their exposure to the danger of being washed overboard, and denied recovery. Similar results have occurred as to statutes requiring elevator shafts to be guarded for the benefit of employees, *Kelly v. Henry Muhs Co.*, 71 N.J.L. 358, 59 Atl. 23 (1904); statutes requiring that railroads fence their rights of way against cattle, where children have gotten on the tracks, *Di Caprio v. New York Central R.R.*, 231 N.Y. 94, 131 N.E. 746 (1921); and statutes requiring drivers of motor vehicles to be licensed, *Mandell v. Dodge-Freedman Poultry Co.*, 94 N.H. 1, 45 A. 2d 577 (1946).

¹⁹⁵ 238 U.S. 243 (1915).

couplers and draw bars was to prevent the risk involved in employees going between the cars for coupling and uncoupling and that there was no basis for saying that the provisions were intended to provide a place of safety between colliding cars. Since the decedent had not been engaged in coupling with or handling the crippled car, he was not one as to whom the absence of the coupler would operate as a breach of duty.

Shortly thereafter, in *Louisville & Nashville R.R. v. Layton*,¹⁹⁷ the Court affirmed a judgment of a Georgia court in favor of a switchman who had been injured while standing on top of one of five cars which were to be coupled to a switch engine and stock car, and which in fact did not couple but were set in motion and collided with a standing train. The Court said here that the purpose of the Act was to protect employees in general, although the immediate occasion for its passage had been the large number of deaths caused by employees going between cars, and that

. . . the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required, not from the position that the employee may be in or the work which he may be doing at the moment he is injured.¹⁹⁸

Of the *Conarty* case, the Court said, "it was not claimed that the collision resulting in the injury complained of was proximately attributable to a violation of the Safety Appliance Acts. . . ." ¹⁹⁹ In the same term, the Court also affirmed recovery under the FELA for the death of a brakeman who was proceeding along the tops of cars on a moving train and was thrown from the train when a defective coupler parted resulting in the sudden setting of the automatic brake.²⁰⁰

The cases of *Lang v. New York Central R.R.*,²⁰¹ in which an employee riding on a freight car to stop it before it reached a cripple did not stop it and was crushed between the cars due to the lack of coupler and drawbar on the crippled, standing car, where recovery was denied, and *Coray v. Southern Pacific Co.*,²⁰² in which the decedent was following a train on a motor car and collided with the train due to the sudden stopping of the latter resulting from defective equipment, where recovery was allowed, lead to the conclusion that the scope of protection may be limited to injuries occurring to persons who are somehow connected with the movement or use of the crippled or defective car. This is borne out by the statement in the *Lang* case that it was like *Conarty* in that in neither case was the movement of the car on which the employee was riding directed toward moving or coupling with the cripple.²⁰³

¹⁹⁷ 243 U.S. 617 (1917).

¹⁹⁸ *Id.* at 621.

¹⁹⁹ *Id.* at 620.

²⁰⁰ *Minneapolis & St. L. R.R. v. Gotschall*, 244 U.S. 66 (1917).

²⁰¹ 255 U.S. 455 (1921).

²⁰² 335 U.S. 520 (1949).

²⁰³ *Lang v. New York Central R.R.*, 255 U.S. 455, 461 (1921)

And in *Davis v. Wolfe*,²⁰⁴ which did not involve a collision but did involve the use of a defective appliance by the employee, the Supreme Court summarized the holdings of the *Conarty*, *Lang* and *Layton* cases as making a distinction between violations which caused the accident in which the plaintiff was hurt and violations which merely created a situation in which the accident, otherwise caused, resulted in injury.

In non-collision cases, similar reasoning is found. In *Minneapolis St. Paul & Sault Sainte Marie Ry. v. Goneau*,²⁰⁵ the plaintiff was granted recovery where he fell from a bridge while attempting to repair a defective coupler. In *Erie R.R. v. Caldwell*,²⁰⁶ plaintiff was injured when he jumped on moving cars in an attempt to stop them after a coupler had broken, and recovery was allowed. On the other hand, in *Reetz v. Chicago & Eastern R.R.*,²⁰⁷ where broken couplers caused the train to stop and plaintiff fell from a bridge while walking along the train to locate the brake, recovery was denied on the ground that the defect created only an "incidental condition" in which other causes produced the accident. The *Goneau* and *Caldwell* decisions were distinguished on the ground that there the accidents were directly connected with attempts to repair the coupler or prevent damage resulting from the movement caused by the defective coupler. Apparently the courts are requiring that the employee must be working with the defective equipment itself to be within the scope of risk, but where an engineer attempted to repair a hot air pump and the resulting overheating and overexertion resulted in his death, the court found that the defective air pump was not the proximate cause of injury.²⁰⁸

The apparent scope of the Boiler Inspection Act is broader, in view of its requirement of equipment which is "in proper condition and safe to operate . . . without unnecessary peril to life or limb."²⁰⁹ However, the cases in which recovery has been allowed under this Act seem to involve some use or operation of the defective equipment: In *Urie v. Thompson*,²¹⁰ the fireman was subjected to silicon dust while working on engines equipped with defective sanders; in *Bolan v. Lehigh Valley R.R.*,²¹¹ the plaintiff was attempting to step onto a worn pilot step; in *Lehigh Valley R.R. v. Beltz*,²¹² the conductor was riding in the cab of a train whose boiler exploded; in *Lehigh Valley R.R. v. Huben*,²¹³ the plaintiff was injured when the runaway engine in the *Beltz* case

²⁰⁴ 263 U.S. 239, 243 (1923).

²⁰⁵ 269 U.S. 406 (1926).

²⁰⁶ 264 Fed. 947 (6th Cir. 1920).

²⁰⁷ 46 F. 2d 50 (6th Cir. 1931).

²⁰⁸ *Powell v. Waters*, 55 Ga. App. 307, 190 S.E. 615 (1937).

²⁰⁹ Act of February 17, 1911, §2, as amended, 45 U.S.C. §23 (1952 ed.).

²¹⁰ 337 U.S. 163 (1949).

²¹¹ 167 F. 2d 934 (2d Cir. 1948).

²¹² 10 F. 2d 74 (2d Cir. 1925), *cert. denied*, 270 U.S. 641 (1925).

²¹³ 10 F. 2d 78 (2d Cir. 1925).

crashed into the train on which he was working; in *Alabama Great Southern R.R. v. Smith*,²¹⁴ the plaintiff was engaged in making repairs on the defective engine.

While cases under both of these acts indicate that the protection offered extends beyond the precise operations which originally gave rise to their enactment, the plaintiff must still establish that the injury resulted from movement or use of the defective equipment. Such limitation is undoubtedly justified in view of the requirement of the acts that the car be "in use" or being hauled on the line of the carrier.²¹⁵

The FELA is broader than the safety acts in that it encompasses any injury resulting while the employee is engaged in interstate commerce or some activity closely connected therewith, and is not confined to injuries resulting from defective equipment. It would appear, therefore, that so long as the plaintiff or his decedent falls within the category of employees covered the general principles of determining the scope of liability in terms of the foreseeable risk involved in the activity²¹⁶ would be applicable.

Another problem of the nature of injuries covered by the acts was presented in *Urie v. Thompson*,²¹⁷ although not in terms of "proximate cause." There the plaintiff had been employed as a fireman on the Missouri Pacific lines for many years and had contracted silicosis. He brought action under the FELA claiming that the silicosis resulted from excessive amounts of sand being thrown onto the tracks by faulty sanders, where it was ground into fine dust and blown into the cab where plaintiff worked. The Supreme Court of Missouri originally held that there was not sufficient showing of notice on the part of the carrier to maintain an action for negligence under the FELA but that the complaint might be amended to allege a violation of the Boiler Inspection Act.²¹⁸ The plaintiff amended his complaint to allege in more detail a violation of the Boiler Inspection Act and recovered in a jury trial in which the issue of negligence was not submitted to the jury. The Missouri Supreme Court then reversed on the ground that silicosis was not the type of injury to be protected against by the Boiler Inspection Act, drawing a distinction between "accidental" injuries attended by some force or violence and purely pathological injuries occurring over a long period of time and saying that the latter were not covered by the act.²¹⁹ The Supreme Court of the United States reversed this decision, saying that silicosis was within the term "injury" under either the FELA or the Boiler Inspection Act and that plaintiff might have recovered under

²¹⁴ 256 Ala. 220, 54 So. 2d 453 (1951).

²¹⁵ See note 156 *supra*.

²¹⁶ See MORRIS, TORTS 185, 186 (1953); PROSSER, TORTS 259 (2d Ed. 1955).

²¹⁷ 357 Mo. 738, 210 S.W. 2d 98 (1948), *reversed*, 337 U.S. 163 (1949).

²¹⁸ 352 Mo. 211, 176 S.W. 2d 471 (1943).

²¹⁹ 357 Mo. 738, 210 S.W. 2d 98 (1948).

either act.²²⁰ Four of the Justices, however, agreed that under the Boiler Inspection Act only "accidental" injuries should be compensated.²²¹ No other similar cases appear to have arisen under the Safety Appliance Acts, although recovery has been granted under the FELA for chrome rash alleged to have resulted from contact with a rust inhibitor used by the carrier in its roundhouse over a period of time.²²² Inasmuch as at least one court has found that permitting a boiler to be operated with water which "foamed" and made the water gauge inaccurate was within the Boiler Inspection Act,²²³ it might be argued that the use of additives in the water which could cause injury if they come in contact with the persons of employees would render the boiler unsafe to operate without unnecessary danger. Similar arguments might be made for recovery for exposure resulting from defective equipment or from construction which permits exposure,²²⁴ although in *Powell v. Waters*²²⁵ overexertion and overheating resulting from attempts to repair a defective air pump were not treated as the "proximate results" of the defect. In *Knox v. Atchison, T. & S.F. Ry.*,²²⁶ where plaintiff complained of loss of hearing resulting from

²²⁰ 337 U.S. 163 (1949). Although the appeal was from the second reversal by the Missouri Supreme Court, the Supreme Court of the United States looked back to the original proceedings and found that there was sufficient allegation of notice on the part of the carrier of the dangers inherent in the sanders that a claim of negligence under the FELA, independent of the violation of the Boiler Inspection Act, could have been maintained.

²²¹ *Id.* at 196-197 (Frankfurter J., with Reed, Jackson and Burton, JJ. joining in concurring and dissenting opinion). The four justices agreed that silicosis might be an injury within the terms of the FELA, thereby confirming the decision of the New York Court of Appeals in *Sadowski v. Long Island R.R.*, 292 N.Y. 448, 55 N.E. 2d 497 (1944) permitting recovery for silicosis.

²²² *Evinger v. Thompson*, 364 Mo. 658, 265 S.W. 2d 726 (1954).

²²³ *Atlantic Coast Line R.R. v. Wetherington*, 245 Ala. 313, 16 So. 2d 720 (1944).

²²⁴ In *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) a Wisconsin statute requiring cab curtains to protect the employees from exposure was held ineffective since the Boiler Inspection Act represented an exercise of power over equipment of locomotives by the federal government, although no such regulation existed. In *Terminal R.R. Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), a state regulation requiring cabooses for the protection of signalmen was upheld in view of the failure of the I.C.C. to make any regulations in regard to cabooses. Both opinions at least tacitly recognize that it would be within the power of the I.C.C. under the Boiler Inspection Act to make requirements for the health of employees. In *Pullman Co. v. Montimore*, 17 F. 2d 2 (5th Cir. 1927); *Gulf & S.I. R.R. v. Bryant*, 147 Miss. 421, 111 So. 451 (1927); *Gulf, C. & S.F. Ry. v. Waterhouse*, 223 S.W. 2d 654 (Tex. Civ. App. 1949); recovery was allowed on the basis of negligence resulting in exposure to the elements. Cases denying recovery under the FELA for exposure appear to turn on the question of whether there is negligence in requiring work under certain conditions, *Sabatino v. Reading Co.*, 16 F. Supp. 215 (D. N. J. 1936); *Wichita Falls & S.R.R. v. Burton*, 35 S.W. 2d 476 (Tex. Civ. App. 1931), or assumption of this sort of risk by the employee, *Chesnut v. Chicago, B. & Q. Ry.*, 284 Ill. App. 317, 1 N.E. 2d 811 (1936).

²²⁵ 55 Ga. App. 307, 190 S.E. 615 (1937).

²²⁶ 95 Cal. App. 2d 896m 214 P. 2d 589 (1950).

failure to equip the locomotive with mufflers, the court refused to allow recovery primarily on the basis that the mufflers were not required under the Boiler Inspection Act rather than on the question of the nature of the injury compensable.

DEFENSES

Having examined the FELA and the Safety Appliance and Boiler Inspection Acts and compared the nature of the duty imposed by each, the things which will constitute a breach of that duty and the scope of liability for such breach, let us now turn to the defenses which may be available to the carrier in an action brought under one or more of these acts. At the very outset of such a discussion, it should be repeated that the defense of due care which is available under the FELA alone cannot be raised in relation to either of the other two acts. It remains to be seen whether the "absolute" nature of the duty imposed upon the carrier also has the effect of removing any other defenses.

Assumption of Risk

The original FELA provided that in an action brought to recover damages for injuries to, or the death of an employee of a common carrier the employee should not be held to have assumed the risks of his employment if the carrier's violation of a statute enacted for the safety of employees had contributed to the injury or death.²²⁸ This left open the assumption of risk defense in actions not brought under the Safety Appliance and Boiler Inspection Acts.²²⁹ In 1939, an amendment to the FELA extended the provisions of this section so that today an employer is not deemed to have assumed the risks of his employment "where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier" as well as where the injury or death resulted in whole or in part from violation of a safety act.²³⁰

The original Safety Appliance Act also did away with assumption of risks occasioned by a violation of its provisions.²³¹ In *Schlemmer v. Buffalo, Rochester & Pittsburgh Ry.*,²³² in an effort to couple two cars which had failed to couple on the first impact, the plaintiff's decedent went between the cars to guide the drawbar and was crushed when the cars came together. The trial court directed a nonsuit on the ground that the decedent had been guilty of contributory negligence rather than merely having assumed the risk. The Supreme Court reversed and remanded saying that the defense of assumption of risk covered both the risk of negligence of others and the risk of defective appliances, that assumption of risk shaded into negligence, and that great care must be

²²⁸ Act of April 22, 1908, §4, 35 Stat. 66.

²²⁹ See, e.g., *Great Northern Ry. v. Leonidas*, 305 U.S. 1 (1938).

²³⁰ Act of August 11, 1939, §1, 45 U.S.C. §54 (1952 ed.).

²³¹ Act of March 2, 1893, §8, 45 U.S.C. §7 (1952 ed.).

²³² 205 U.S. 1 (1908).

taken lest "the servant's rights . . . be sacrificed by simply charging him with assumption of risk under another name."²³³ Following a second trial and a jury verdict in favor of the plaintiff, a judgment *n.o.v.* was granted on the ground that the evidence established contributory negligence as a matter of law, which judgment was affirmed in a second hearing by the Supreme Court.²³⁴ Other cases have repeated the admonition of the first *Schlemmer* opinion that the courts must not bar the plaintiff's actions by treating what would normally be an assumption of risk as "contributory negligence."²³⁵ The distinction is at best a hazy one, but the standard seems to be that announced in the first *Schlemmer* opinion:

. . . the practical difference of the two ideas is in their degree of proximity to the particular harm. The preliminary conduct of getting into a dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; . . .²³⁶

Looking at the facts of that case, the decedent's going between the cars was apparently merely an assumption of risk, while his rising up as the cars came together so that his head was between them could be treated as contributory negligence.

The Boiler Inspection Act makes no provision as to assumption of risk, although where an action is brought under the FELA, as usually occurs, the defense is negated by the terms of the latter act. It has been suggested that under the Boiler Inspection Act, as under the other two, there is no defense of assumption of risk,²³⁷ but the cases so stating involve the FELA.²³⁸ In view of the language of the second *Schlemmer* case that in the absence of statute such defenses continue,²³⁹ and in view of the fact that assumption of risk has been recognized as a defense in other actions relying upon liability without fault,²⁴⁰ some argument could

²³³ *Id.* at 13.

²³⁴ 220 U.S. 590 (1911).

²³⁵ See, *e.g.*, *Chicago Junction Ry. v. King*, 169 Fed. 372, 377 (7th Cir. 1909), *aff'd*, 222 U.S. 222 (1911); *Byler v. Wabash R.R.*, 196 F. 2d 9, 12 (8th Cir. 1952), *cert. denied*, 344 U.S. 826 (1952).

²³⁶ *Schlemmer v. Buffalo, R. & P. Ry.*, 205 U. S. 1, 12 (1907).

²³⁷ Richter and Forer, *Federal Employers' Liability Act*, 12 FED. RULES DEC. 12, 1946 (1952).

²³⁸ See, *e.g.*, *Lilly v. Grand Trunk Western Ry.*, 317 U.S. 481, 491 (1943); *McCarthy v. Pennsylvania R.R.*, 156 F. 2d 877, 880 (7th Cir. 1946); *Erie R.R. v. Lindquist*, 27 F. 2d 98, 99 (3d Cir. 1928); *Cantley v. Missouri-K.-T. R.R.*, 353 Mo. 605, 612, 183 S.W. 2d 123, 126, (1944).

²³⁹ *Schlemmer v. Buffalo, R. & P. Ry.*, 220 U. S. 590, 597 (1911).

²⁴⁰ See, *e.g.*, *E. I. DuPont de Nemours & Co. v. Cudd*, 176 F. 2d 855 (10th Cir. 1949); *Bowen v. Boston & A. R.R.*, 179 Mass. 524, 61 N.E. 141 (1901); *Brown v. Barter*, 26 Tenn. App. 534, 174 S.W. 2d 298 (1943). See also, HARPER, *Torts* 349 (1933); PROSSER, *Torts* 342 (2d ed. 1955); RESTATEMENT, *Torts* §523 (1934).

be made for treating assumption of risk as a valid defense in a non-FELA action brought under the Boiler Inspection Act. Against such argument are cases holding that assumption of risk should not be a defense to an action based upon violation of a statute, where the statute is designed to protect individuals who are not in a position to obtain full protection from the dangers themselves.²⁴¹ If assumption of risk is limited to the situation where the plaintiff continues to engage in normal employment after knowledge of the violation has been brought home to him, and is not extended to including any activity upon the part of the plaintiff which increases the otherwise existing risk, this author agrees that the policy of the Boiler Inspection Act would be better carried out by denying to the carrier this defense, even though no such denial appears in the language of the statute itself.²⁴²

Contributory Negligence

From the beginning, the FELA did away with contributory negligence as a complete bar to recovery. Where injury or death was the result of a violation of one of the safety acts, the employee cannot be found guilty of contributory negligence. In actions where the safety statutes are not involved, a doctrine of comparative negligence is introduced to reduce recovery to the extent that the employee's negligence contributed to the injury.²⁴³

No similar provision appears in either the Safety Appliance or the Boiler Inspection Acts. As indicated above, in *Schlemmer v. Buffalo, Rochester & Pittsburg Ry.*²⁴⁴ the Supreme Court recognized that where reliance is placed solely upon the provisions of the Safety Appliance Act, contributory negligence may be a defense. Later cases have continued to recognize such a defense under the Safety Appliance Acts.²⁴⁵ The

²⁴¹ See, e.g., *Osborne v. Salvation Army*, 107, F. 2d 929 (2nd Cir. 1939); *Narramore v. Cleveland, C.C. & St. L. Ry.*, 96 Fed. 298 (6th Cir. 1899); *Sues v. Arrowhead Steel Products Co.*, 180 Minn. 21, 230 N.W. 125 (1930); *Dusha v. Virginia & Rainey Lake Co.*, 145 Minn. 171, 176 N.W. 482 (1920); *Welch v. Waturbury Co.*, 206 N.Y. 522, 100 N.E. 426 (1912). Cf. *Hudson v. Craft*, 33 Cal. 2d 654, 204 P. 2d 1 (1949).

²⁴² One possible explanation for the omission of any reference to either assumption of risk or contributory negligence in the Boiler Inspection Act was the presence of 45 U.S.C. §§53, 54 (1952 ed.) This still leaves the non-FELA cases without the benefit of these provisions, but many states have adopted state employers' liability acts which contain similar provisions, see e.g., IOWA CODE §§479.124, 479.125 (1954); MINN. STATS. ANN. §§219.79, 219.80 (1947).

²⁴³ Act of April 22, 1908, §3, 45 U.S.C. §53 (1952 ed.).

²⁴⁴ 205 U.S. 1 (1907) (first trial); 220 U.S. 590 (1911) (second trial).

²⁴⁵ *Fairport, P. & E. R.R. v. Meredith*, 292 U.S. 589 (1934); *Minneapolis St. P. & S.S.M. Ry. v. Poplar*, 237 U.S. 369 (1915); *Jackson v. Pirtle*, 75 Ind. App. 336, 127 N.E. 305 (1920); *Floyd v. Thompson*, 356 Mo. 250, 201 S. E. 2d 390 (1947). Cf. *San Antonio, & A.P. Ry. v. Wagner*, 241 U.S. 476, 480 (1916); *El Paso & S.W. Ry. v. Vizard*, 211 U.S. 608, 611 (1909); *Southern Pac. Co. v. Thomas*, 21 Ariz. 355, 364 (188 Pac. 268, 271 1920), cert. denied, 255 U.S. 576 (1921); *Thornbro v. Kansas City, M. & O. Ry.*, 91 Kan. 684, 695-696 139 Pac. 410, 413-414 (1914).

argument has recently been made in two law review articles²⁴⁶ that since liability under the acts is based not upon negligence but upon "absolute duty", the defense of contributory negligence is not and should not be available. One of these articles cites as authority *Zumwalt v. Gardner*,²⁴⁷ in which the court did not actually deny the defense of contributory negligence. There the court merely said that an instruction referring to that defense was erroneous because it emphasized the carrier's claim of having used due care to prevent the accident from occurring. The argument in the second of these articles depends upon the trio of cases, *O'Donnell*, *Carter* and *Affolder*, and the policy which the authors find in these cases of imposing an unqualified obligation upon the carrier as the person most likely to prevent injuries from defective equipment.²⁴⁸ This argument carries considerable weight, particularly when supported by reference to other situations in which contributory negligence has been denied as a defense to actions based on strict liability.²⁴⁹ However, the present author does not agree with the argument and believes that the cases which have continued to recognize contributory negligence as a defense to non-FELA claims support the better view. This conclusion is based on the belief that the objective of the safety acts may be accomplished sufficiently by the denial of the defense of due care and the imposition of a lighter burden of proof upon the plaintiff, which is all that *O'Donnell*, *Carter* and *Affolder* do. If the carrier cannot escape liability by bringing in evidence of the care taken to avoid the accident, and if the injured party may recover by showing mere failure to function, it seems likely that the carrier will have sufficient reason to comply to the fullest extent possible with the provisions of these acts. Furthermore, there seems to be no strong policy argument in favor of compensating an individual who has himself substantially contributed to his own injury by doing something more than merely continuing to work with notice of the defect. If a complete bar seems overly onerous, Congress could amend the safety acts to make provision for "comparative negligence."²⁵⁰

²⁴⁶ Richter and Forer, *Federal Employers' Liability Act*, 12 FED. RULES DEC. 12, 43 (1952); Louisell and Anderson, *The Safety Appliance Act and the FELA: A Plea for Clarification*, 18 LAW & CONTEMP. PROB. 281, 288-295 (1953).

²⁴⁷ 160 F. 2d 298 (8th Cir. 1947), cited in Richter and Forer, *supra* note 246.

²⁴⁸ Louisell and Anderson, *supra* note 246.

²⁴⁹ *Fraser v. Patterson Lumber Co., v. Southern Ry.*, 79 F. Supp. 424 (W.D.-S.C. 1948); *Bowman v. Humphrey*, 132 Iowa 234, 109 N.W. 714 (1906); *Stackpole v. Healy*, 17 Mass. 33 (1819); *Matthews v. Missouri Pac. R.R.*, 142 Mo. 645, 44 S.W. 802 (1897). See Prosser, *Contributory Negligence as Defense to Violation of Statutes*, 32 Minn. L. Rev. 105 (1948). See also, Prosser, *Torts* 341-343 (2d ed. 1955); *Harper, Torts* 347-348 (1933) for discussion of plaintiff's conduct as a defense to an action based on strict liability.

²⁵⁰ Apparently in the process of defining the duty under these acts, Congress may also regulate defenses as well. At least the *Schlemmer* cases, *supra* notes 232, 234, speak as if assumption of risk was eliminated as a defense in all actions arising under the Safety Appliance Acts.

Where contributory negligence has been recognized as a defense in actions under the Safety Appliance Acts, it has generally involved more than a mere continuation of working in connection with equipment which is defective after knowledge of the defect has been brought to the attention of the employee. In the *Schlemmer* case²⁵¹ the plaintiff's decedent had not only gone between the cars but had risen up as the cars came together although he must have known of the dangers of so rising. In *Popplar v. Minneapolis, St. Paul & Sault Sainte Marie Ry.*,²⁵² the brakeman had gone between moving cars in violation of the rule of the company. In *Jackson v. Pirle*,²⁵³ the plaintiff had selected his own way of getting the couplings to work, apparently by kicking the coupling as the cars were brought together. In *Floyd v. Thompson*,²⁵⁴ the deceased attempted to manipulate brakes and move car without taking the precaution of removing a nearby truck against which the loaded car collided. A showing of something more than a mere assumption of risk may be made by evidence that a company rule has been violated, as in the *Popplar* case or as in *Bocook v. Louisville & Nashville R.R.*,²⁵⁵ where the employee went onto a track in violation of a company rule. It should be kept in mind, of course, that if the practical necessities of the situation demand disregard of the rule, as where an employee attempts to jump onto moving cars to stop them when they break loose from the remainder of a train, the violation of the rule may be within the zone of reasonable action.²⁵⁶

It should also be noted that since this defense is available only in actions which are non-FELA actions, state law will govern and therefore such variations as "last clear chance"²⁵⁷ and comparative negligence²⁵⁸ may enter into the actions. Perhaps more important are some state railroad laws which do away with contributory negligence as a defense in state proceedings.²⁵⁹

There appear to be no cases involving the question of contributory negligence as a defense to the Boiler Inspection Acts, other than passing

²⁵¹ *Schlemmer v. Buffalo, R. & P. Ry.*, 220 U. S. 590 (1911).

²⁵² 121 Minn. 413, 141 N.W. 798 (1913), *aff'd*, 237 U.S. 369 (1915).

²⁵³ 75 Ind. App. 336, 127 N.E. 305 (1929).

²⁵⁴ 356 Mo. 250, 201 S.E. 2d 390 (1947).

²⁵⁵ 67 F. Supp. 154, (E.D. Ky. 1946) (FELA so no contributory negligence).

²⁵⁶ See *Popplar v. Minneapolis, St. P. & S.S. M. Ry.*, 121 Minn. 413, 141 N.W. 798 (1913).

²⁵⁷ *Fairport, P. & E. R.R.*, 292 U.S. 589 (1934) where the Ohio court applied not only the doctrine of "last clear chance" but also the allied doctrine of "antecedent negligence" which is not generally accepted in this country.

²⁵⁸ See, PROSSER, TORTS 296-299.

²⁵⁹ See, *e.g.*, IOWA CODE §479.125 (1954); MINN. STAT. ANN. §219.79 (1947). See also, ILL. REV. STAT. c. 114, §152 (1953) which applies only to the Illinois Safety Appliance Act.; OHIO REV. CODE §4973.09 (1955) which introduces into actions by employees against railroads the concept of comparative negligence with the further provision that if the employee's negligence is slight and the carrier's great there shall be no bar at all and no diminution of damages.

reference to the denial of this defense under the FELA.²⁶⁰ Since, however, the safety acts are generally dealt with in the same manner, it seems likely that the same results would follow here as in the case of violations of the Safety Appliance Acts which are not within the FELA.

Fellow Servant Doctrine

The common law doctrine that a servant might not hold his master liable for injuries resulting solely from the negligence of a fellow servant has been recognized in actions not within any of the three acts here involved.²⁶¹ The FELA, by specifically referring to the injuries resulting from the negligence of agents or employees, appears to have abolished this defense as to actions brought under it.²⁶² Even before the enactment of the safety acts, the Supreme Court had recognized an exception to the fellow servant doctrine in cases involving the duty to supply a safe place to work and safe equipment, saying that as to these duties the carrier could not avoid liability by showing that the lack of safe equipment was the result of negligence of the fellow servants.²⁶³ For this reason, cases arising under the safety acts have referred to the negligence of fellow servants as a defense only where such negligence relates to the operation of the equipment and becomes the sole cause of the injury.²⁶⁴ Even if this exception to the doctrine were not recognized, however, the negligence of a fellow servant in causing equipment to become unsafe within the terms of the acts should be disregarded for two reasons. First, the doctrine is merely a specialized form of assumption of risk,²⁶⁵ one of the hazards of employment which is accepted by the

²⁶⁰ See, e.g., *Lilly v. Grand Trunk Western Ry.*, 317 U.S. 481, 491 (1943); *McCarthy v. Pennsylvania R.R.*, 156 F. 2d 877, 880 (7th Cir. 1946); *Louisville & N. R.R., v. Stephens*, 298 Ky. 328, 337, 182 S.W. 2d 447, 453 (1944).

²⁶¹ *New England R.R. v. Conroy*, 175 U.S. 323 (1899); *Baltimore & O. R.R. v. Baugh*, 149 U.S. 368 (1893).

²⁶² *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943); *Jamison v. Encarnacion*, 281 U.S. 635 (1930); *Minneapolis, St. P. & S.S.M. Ry. v. Rock*, 279 U.S. 410 (1929); *Chicago, R. I. & P. Ry. v. Ward*, 252 U.S. 13 (1920); *Boldt v. Pennsylvania R.R.*, 245 U.S. 441 (1918); *Chesapeake & O. Ry. v. De Atley*, 241 U.S. 310 (1916); *Central Vermont Ry. v. White*, 238 U.S. 507 (1915). Although there has been language to the effect that an employee assumes the risk of negligence of his fellow employees under the FELA, *Toledo, St. L. & W. R.R., v. Allen*, 276 U.S. 165, 169 (1928), such statements predate the 1939 abolition of assumption of risk in all cases under the FELA, see 45 U.S.C. §54 (1952 ed.), and are inconsistent with the language of 45 U.S.C. §51 (1952 ed.) and the cases cited above.

²⁶³ *Union Pac. R.R. v. Daniels*, 152 U.S. 684 (1894); *Northern Pac. R.R. v. Herbert*, 116 U.S. 642 (1885); *Hough v. Railway Co.*, 100 U.S. 213 (1879).

²⁶⁴ See, e.g., *St. Louis, I.M. & S. Ry. v. Taylor*, 210 U.S. 281 (1908); *Grew v. Boston & M.R.R.*, 83 N.H. 383, 142 Atl. 707 (1928); *Rush v. Thompson*, 355 Mo. 568, 202 S.W. 2d 300 (1947); *Ehalt v. McCarthy*, 104 Utah 110, 138 P. 2d 639 (1943).

²⁶⁵ See, e.g., *Toledo, St. L. & W. R.R. v. Allen*, 276 U.S. 165, 169 (1928); *New England R.R. v. Conroy*, 175 U.S. 323, 327 (1899); PROSSER, TORTS 380 (2d ed. 1955).

employee as a condition of employment, and as indicated above assumption of risk should not be a defense to a violation of the safety acts. Second, although the master in the ordinary situation might have an argument that when he supplied equipment which was originally safe and also used reasonable care in choosing employees he had satisfied any duty of due care, under these acts the due care of the carrier is irrelevant. To allow him to avoid liability on the basis of the negligence of a fellow servant (which would be the likely cause of couplers, brakes and grab irons becoming defective) would be inconsistent with the theory of liability imposed by these acts.

Miscellaneous Defenses

The FELA contains a specific statute of limitations of three years from the date when the cause of action accrued.²⁶⁶ No such provisions appear in either of the safety acts, and where actions are brought on them not within the terms of the FELA, state procedure controls.²⁶⁷

The FELA provides that "any contract, rule regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void," with the proviso that the carrier may set off any sum contributed or paid to insurance, relief benefit or indemnity which has been paid to the injured employee or the person entitled to maintain the action on account of the employee's injury or death.²⁶⁸ It is clear that this provision does not relate to releases or settlements made after the injury has occurred,²⁶⁹ but is intended to prevent the carrier from obtaining a general release prior to the accident from all claims that might arise out of employment,²⁷⁰ or from establishing unreasonable company rules placing the burden on the employee

²⁶⁶ Act of April 22, 1908, §6, as amended, 45 U.S.C. §56 (1952 ed.). As to the question of when the cause of action accrues in cases involving occupational disease, see *Urie v. Thompson*, 337 U.S. 163 (1949); *Sadowski v. Long Island R.R.*, 292 N.Y. 448, 55 N.E. 2d 497 (1944). As to accrual of actions for death of employees, see *Baltimore & O. S.W. R.R. v. Carroll*, 290 U.S. 491 (1930); *Dusek v. Pennsylvania R.R.*, 68 F. 2d 131 (7th Cir. 1933).

²⁶⁷ *Nichols v. Chesapeake & O. Ry.*, 195 Fed. 913 (6th Cir. 1912); *Walton v. Southern Pac. Co.*, 8 Cal. App. 2d 290, 48 P. 2d. 168 (1935); *Grew v. Boston & M. R.R.*, 83 N.H. 383, 142 Atl. 707 (1928).

²⁶⁸ Act of April 22, 1908, §5, 45 U.S.C. §55 (1952 ed.).

²⁶⁹ *Callen v. Pennsylvania R.R.*, 332 U.S. 625 (1948); *Ahern v. Southern Buffalo Ry.*, 103 N. 545, 104 N.E. 2d 898 (1952), *aff'd* 344 U.S. 367 (1953); *Falco v. Pennsylvania R.R.*, 202 Miss. 769, 109 N.Y.S. 2d 279 (1951). An indemnity agreement entered into by a railroad with one other than the injured employee does not affect the claims of the employee at all, *Chicago & N.W. Ry. v. Davenport*, 205 F. 2d 589 (5th Cir. 1953); *Gaulden v. Southern Pac. Co.*, 78 F. Supp. 651 (N. D. Cal. 1948).

²⁷⁰ *Philadelphia, B. & W. R.R. v. Schubert*, 224 U.S. 603 (1912); *Oliver v. Northern Pac. Ry.*, 196 Fed. 432 (N.D. Wash. 1912); *Rief v. Great Northern Ry.*, 126 Minn. 430, 148 N.W. 309 (1914).

to protect himself from dangers which are the normal basis of liability,²⁷¹ or from obtaining agreements to limit the venue of an action brought against the railroad.²⁷² Since the Safety Appliance and Boiler Inspection Acts contain no such provision, the effect of general waivers of rights, rules, etc. are left to state law in cases which involve only intrastate commerce.²⁷³

On the basis of federal supremacy, state compensation laws can not bar an action under the FELA.²⁷⁴ It is now settled, however, that since actions brought under either of the safety acts independent of the FELA are common law actions and not federally created rights of action, state compensation laws may validly bar the common law action.²⁷⁵

To meet the common law rule that all causes of action for personal injury terminate on the death of the victim, the FELA contains two specific provisions allowing the personal representative of a deceased employee to maintain an action for the benefit of the surviving widow or husband and the children of the employee, or if none exist for the benefit of the parents or next of kin. The first of these is an action for

²⁷¹ *Byler v. Wabash R.R.*, 196 F. 2d 9 (8th Cir. 1952), *cert. denied* 344 U.S. 826 (1952); *Cato v. Atlanta & C.A. L. Ry.*, 164 S.C. 123, 162 S.E. 239 (1931); *Fried v. New York, N.H. & H. R.R.*, 183 App. Div 115, 170 N.Y. Supp. 697 (1918). As to safety rules which are reasonably necessary for the operation of the railroad, and which therefore do not become void under this section, see *Jacobson v. Chicago & N.W. Ry.*, 221 Minn. 454, 22 N.W. 2d 455 (1946); *Grosvenor v. New York Cent. R.R.*, 343 Mo. 611, 123 S.W. 2d 173 (1938).

²⁷² *Boyd v. Grand Trunk Western Ry.*, 338 U.S. 263 (1949); *Krenger v. Pennsylvania R.R.*, 174 F. 2d 556 (2d Cir. 1949), *cert. denied*, 338 U.S. 866 (1949); *Akerly v. New York Cent. R.R.*, 168 F. 2d 812 (6th Cir. 1948).

²⁷³ *Gilvary v. Cuyahoga Valley Ry.*, 292 U.S. 57 (1934). For a general discussion of releases and avoidance thereof for fraud or mistake see 3 CORBIN, CONTRACTS 358-359, 6 Id. 142-143 (1950). Such means of avoiding releases would seem to apply equally to FELA actions where the release is not barred by the above section.

²⁷⁴ See, *e.g.*, *Boston & M. R.R. v. Armbrugg*, 285 U. S. 234 (1932); *New York Cent. R.R. v. Proter*, 249 U.S. 160 (1919); *New York Cent. R.R. v. Winfield*, 244 U.S. 147 (1917).

²⁷⁵ *Tipton v. Atchison, T. & S.F. Ry.*, 298 U.S. 141 (1936). Prior to the decision in the *Tipton* case, two California cases, *Walton v. Southern Pac. Co.*, 8 Cal. App. 2d 290, 48 P. 2d 108 (1935); *Ballard v. Sacramento Northern Ry.*, 126 Cal. App. 486, 14 P. 2d 1045, 15 P. 2d 793 (1932) had held that since there was a common law action under the federal safety acts this was not excluded by the California compensation act. In *Breich v. Central R.R.*, 312 U.S. 484 (1941), the Court after recognizing that the cause of action was controlled by state law, relied upon *Miller v. Reading Co.*, 292 Pa. 44, 140 Atl. 618 (1928), in holding that in Pennsylvania an action based on the Federal Safety Appliance Act and "not arising from the ordinary relation of employer and employee" was enforceable by a common law action irrespective of the compensation law. In *Gilvary v. Cuyahoga Valley Ry.*, 292 U.S. 57 (1934), the court gave effect to an agreement between the carrier and the plaintiff that any recovery for injuries sustained while plaintiff was engaged in intrastate commerce was to be governed by the Ohio workmen's compensation act.

death,²⁷⁶ the other a survival action.²⁷⁷ While the Safety Appliance Acts and the Boiler Inspection Act lack such provisions, several courts have allowed actions after the death of the employee based on these safety acts alone.²⁷⁸ With the more recent recognition that these safety acts create no federal cause of action, although they may give rise to common law actions in the state courts, it would seem that any survival or wrongful death action would be dependent upon the state statutes on this matter.²⁷⁹

Whereas the FELA provides for a rather comprehensive unified system of protection of employees of carriers who are engaged in interstate commerce, the safety acts do little more than spell out the nature of the duty imposed upon carriers. The result is that where the injured person is an employee who is engaged only in intrastate commerce, or is not even an employee of the carrier, the machinery of recovery is left largely to the determination of the states themselves. This may result in inconsistencies in the protection offered two individuals injured in the same manner, or inconsistencies in the protection offered to a single person by the courts of two different states.

²⁷⁶ Act of April 22, 1908, §1, 45 U.S.C. §51 (1952 ed.). In order to maintain such an action the personal representative must allege and establish the existence of the designated beneficiaries. *Moffet v. Baltimore & O. R.R.*, 220 Fed. 39 (4th Cir. 1914); *Thomas v. Chicago & N.W. Ry.*, 202 Fed. 766 (N.D. Iowa 1913); *St. Louis & S.F. Ry. v. Dorman*, 205 Ala. 609, 89 So. 70 (1921). This section creates a cause of action which is distinct from that of the employee and under which only the pecuniary loss to the designated beneficiaries may be recovered. *St. Louis, I.M. & S. Ry., v. Craft*, 237 U.S. 648 (1915); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59 (1912).

²⁷⁷ Act of April 5, 1910, c. 143 §2, 36 STAT. 291, 45 U.S.C. §59 (1952 ed.). This provision for a survival action was necessary since under the original FELA the cause of action of the employee was held not to survive, *St. Louis, I.M. & S. Ry. v. Hasterly*, 228 U.S. 702 (1913); *Fulgham v. Midland Valley Ry.*, 167 Fed. 660 (W.D. Ark. 1909); *Walsh v. New York, N.H. & H. R.R.*, 173 Fed. 494 (D. Mass. 1909). Since the damages recoverable may include pain and suffering of the deceased employee prior to his death, as distinguished from the damages under the wrongful death provisions of the original FELA, there must be some showing that the employee did live if even for a short time following the accident. *St. Louis, I.M. & S. Ry. v. Craft*, 237 U.S. 648 (1915); *Norfolk & W. Ry. v. Holbrook*, 235 U.S. 625 (1915). In bringing this survival action, as in the case of the death action, it is necessary to plead and prove the existence of the designated beneficiaries. *St. Louis & S.F. Ry. v. Holdham*, 188 Okla. 245, 107 P. 2d 1917 (1940); *Cf. Cincinnati, N.O. & T.P. Ry., v. Claybourne*, 169 Ky. 315, 183 S.W. 903 (1916).

²⁷⁸ *Ross v. Schooley*, 257 Fed. 290 (7th Cir. 1919), *cert. denied*, 249 U.S. 615 (1919); *Pennsylvania R.R. v. Logansport Loan & Trust Co.*, 29 F. 2d 1 (7th Cir. 1928); *Kraemer v. Chicago & N.W. Ry.*, 148 Minn. 310, 181 N.W. 848 (1921).

²⁷⁹ See, *e.g.*, *Tipton v. Atchison T. & S.F. Ry.*, 298 U.S. 141, 147-148 (1936); *Jacobson v. New York, N.H. & H. R.R.*, 206 F. 2d 153, 157 (1st Cir. 1953), *Central R. R. of N. J. v. Breisch*, 112 F. 2d 595, 599 (3d Cir. 1940).

JOINDER OF CLAIMS

A plaintiff seeking to recover for injuries resulting from the use of railroad equipment may benefit from reliance upon both the FELA and the Safety Appliance Acts and/or the Boiler Inspection Act. The latter permit him to recover without having to prove lack of care on the part of the carrier and may allow him to establish his claim simply by showing that the equipment failed to function properly. The former allows him to recover not only for defective construction or failure to function but also for negligent operation of otherwise safe equipment. The FELA also makes it explicit that he will not be met by the defenses of assumption of risk, the fellow servant doctrine and contributory negligence and in case of the death of the employee assures that an action may be maintained for the benefit of the next of kin.

Where there is no doubt that the plaintiff was an employee of an interstate carrier engaged in work closely connected with interstate commerce, and he can establish a violation of one of the safety acts, no difficulty arises in bringing a FELA action relying upon the safety act to create an "absolute" duty breach of which constitutes "negligence".²⁸⁰ There is no problem of joinder, but rather a single cause of action. Such an action may be brought in either a federal or a state court having jurisdiction over the defendant carrier.²⁸¹

But plaintiff may be in some doubt as to whether he can establish a violation of one of the safety acts, such as where a coupling did not make and the failure may be the result either of defective equipment or negligent operation of the couplers by a fellow employee or where a boiler explodes and the explosion could be due either to a defect in construction or maintenance of the boiler or negligence on the part of the engineer in failing to maintain the proper water level in the boiler. In such a situation, it would be advantageous to bring an action under the FELA in which the complaint alleges both a violation of the safety act and common law negligence in operation. Inasmuch as both of these claims are within the terms of the FELA, the action may be brought in either a federal or a state court, but some question arises as to whether the plaintiff is alleging one or two causes of action and whether they may be joined.

It might appear that there is in fact but one cause of action, since there is presumably but one injury to the plaintiff and the facts surrounding that injury might be treated as a unit for the purpose of finding a violation of a duty on the part of the carrier. It has been suggested

²⁸⁰ See, *e.g.*, *Lilly v. Grand Trunk Western Ry.*, 317 U.S. 481, 485 (1943); *Baltimore & O. R.R. v. Groeger*, 266 U.S. 521, 528 (1925); *Spokane & I. R.R. v. Campbell*, 241 U.S. 497, 510 (1915); *San Antonio & A. P. Ry.*, 241 U.S. 476, 484 (1915).

²⁸¹ Act of April 5, 1910, c. 143, §1, 36 Stat. 291, 45 U.S.C. §56 (1952 ed.). Questions of when jurisdiction does exist and problems of venue are not discussed here, except as to the existence of a federal cause of action.

that for most purposes a "cause of action" should be defined as "an aggregate of operative facts giving rise to a right or rights . . . which will be enforced by the courts," with the number and extent of the facts to be included within a single cause dependent upon considerations of practical trial convenience.²⁸² Adopting this view, the primary objections to treating claims for violation of a safety act and for common law negligence as but two theories for the single cause of action would appear to be the difference in the nature of the duty upon which each claim is based and the fact that procedural problems differ. Contributory negligence is irrelevant to the violation of the safety act, but may be used to reduce damages for negligence. Under the Safety Appliance Acts failure of a coupler to hold or couple or failure of a brake to function is the ultimate question, whereas under the claim for negligence it is an evidentiary fact which may be used to raise an inference of negligence, but does not preclude a finding for the defendant. Such distinctions probably justify a requirement that the claims be pleaded in separate counts and that the jury be given separate instructions as to each claim,²⁸³ but they do not necessarily demand that the claims be tried separately so that joinder is improper. Since for the purposes of the FELA the only questions which will be raised are those of manner of pleading and permissibility of joinder, if these two obstacles can be overcome it may not be necessary for a court to make a decision as to whether one or two causes of action are involved. Under the Federal Rules of Civil Procedure²⁸⁴ and similar liberal provisions of state pleading²⁸⁵ all claims which the plaintiff has against a single party may be joined in one complaint. Where the state statutes permit joinder of all causes for injury to the person²⁸⁶ or for injuries to person and property²⁸⁷ or all causes arising out of the same transaction,²⁸⁸ there is likewise no problem of joinder. Even in those states which have retained forms of action, joinder is possible because both claims do come within the same form.²⁸⁹

²⁸² CLARK, CODE PLEADING 127 (2d ed. 1947).

²⁸³ See, e.g., *O'Donnell v. Elgin, J. & E. Ry.*, 338 U.S. 384, 391-392 (1949); *Hallada v. Great Northern Ry.*, 69 N.W. 2d 673, 682-683 (Minn. 1955).

²⁸⁴ FED. RULES CIV. PROC. 18 (a).

²⁸⁵ E.g., IOWA RULES CIV. PROC. 22 (1943); MINN. RULES CIV. PROC. §18.01 (1952); NEV. RULES CIV. PROC. 18(a) (1953); N.Y. CIV. PRAC. ACT. §258 (1955 Supp.).

²⁸⁶ E.g., CAL. CODE CIV. PROC. §DBG (West 1955); ORE. COMP. LAWS §1-911 (1940); WASH. REV. CODE §4.36.150 (1955).

²⁸⁷ OHIO REV. CODE §2309.05 (1956); CONN. GEN. STAT. §7819 (1949 rev); NEB. REV. STAT. §25-701 (1948 rev).

²⁸⁸ CAL. CODE CIV. PROC. §427 (West 1955) permits joinder under this heading and also joinder of claims for injury to person and injury to property "arising out of the same tort"; WASH. REV. CODE §4.36.150 (1955). See also statutes cited in note 287 *supra*.

²⁸⁹ MASS. ANN LAWS c. 231 §§1, 7a (1954); VT. REV. STAT. §1611 (1947) classify all sections as "contract, tort or replevin." As to permissibility of joinder of a claim for violation of statute and a common law claim for negligence see *Bouchard v. Central Vermont Ry.*, 87 Vt. 399, 89 Atl. 475 (1914).

Much the same questions may be raised with regard to attempts to join claims under the Safety Appliance Acts and under the Boiler Inspection Act. Such joinder may be desirable if it is not clear whether there has been a violation of one or the other, as where an employee falls from a tender and it is uncertain whether his fall was due to improper grab irons or a collection of ice as in the *Lilly* case. Here, in fact, the similarity of procedure and defenses would appear to argue even more strongly for the view that there is a single cause of action with two theories.

A more difficult case arises where the plaintiff is uncertain as to whether he can bring himself within the terms of the FELA, although he believes he can rely upon a violation of a safety act. This may occur where he is nominally an employee of an independent contractor who works in close conjunction with the railroad employees and may or may not be subject to control by the carrier. In such a situation the plaintiff will want to join a claim under the FELA for violation of the safety act with a claim under the common law for violation of the statutory duty. This not only raises the question of joinder, but also a question of whether there are separate and distinct causes of action for the purposes of federal jurisdiction. The federal courts have made it clear that absent diversity of citizenship²⁰⁰ a claim relying upon the safety acts alone is not a subject of federal jurisdiction.²⁰¹ Therefore where the plaintiff attempts to join a claim under the FELA and a non-FELA claim, the court will have to apply the test set up in *Hurn v. Oursler*²⁰²: whether there is a single cause of action with two distinct grounds in support thereof, or whether there are two distinct causes of action. The application of this test is undoubtedly one of practical administration, since the injury to the plaintiff is the same under both claims. The problem of administration may be somewhat more complicated than in the situations above, however, for there may be differing statutes of limitations, differing rules for death actions,²⁰³ and differing rules as to the effect of a general release. There is certain to be a difference in the defense of contributory negligence, and under the Boiler Inspection Act there may be a defense of assumption of risk. Such differences have led several courts to treat the claims as separate, at least for the purposes of

²⁰⁰ As to the problem of diversity of citizenship where the defendant is incorporated in more than one state, see *Patch v. Wabash R.R.* 207 U.S. 277 (1907); *Seavey v. Boston & M. R.R.*, 197 F. 2d 485 (1st Cir. 1952); *Gavin v. Hudson & M. R.R.* 185 F. 2d 104 (3d Cir. 1950); *Waller v. New York, N.H. & H. R.R.*, 127 F. Supp. 863 (S.D.N.Y. 1955), noted 3 U.C.L.A. LAW REV. 98 (1955).

²⁰¹ *Jacobson v. New York, N.H. & H. R.R.*, 206 F. 2d 153 (1st Cir. 1953).

²⁰² 239 U.S. 238, 246 (1933).

²⁰³ In California, for example, an action may be brought under the survival statute for the benefit of the estate at large, CAL. CIV. CODE §956 (West 1955), although the death actions are limited much as the FELA, CAL. CODE CIV. PROC. §377 (West 1955).

pleading.²⁹⁴ It should be noted that for purposes of amendment to allege a new claim, the federal courts seem to treat such claims as a single cause of action with two theories.²⁹⁵ In view of the desirability of having but one trial of the same fact situation seeking the same relief, i.e. compensation for injury, the author believes that the federal courts should treat the safety act claim at least as "ancillary" to the federal claim under the FELA and take jurisdiction over both. Of course, in state courts no such problem exists as to jurisdiction, since both are within the state court's jurisdiction.

As has been stated above, where claims are made under two or more of these acts independent of one another they should be pleaded in separate counts.²⁹⁶ It appears unnecessary, however, that the specific acts be referred to by name, so long as the essential elements of an action under each is alleged.²⁹⁷ For example, under the FELA, the plaintiff must allege that the defendant is a carrier by railroad engaged in interstate commerce, that he is an employee of such carrier (or the personal representative with the designated beneficiaries surviving²⁹⁸) and was employed in interstate commerce at the time of injury, and that the injury or death resulted in whole or in part from the negligence of the carrier, its officers, agents or employees, or from a defect due to the negligence of the carrier. Under the Boiler Inspection Act it apparently would be sufficient to allege that the injury resulted from the locomotive, tender, or an appurtenance thereof not being in proper condition nor safe to operate in the service to which it is put without unnecessary peril to life or limb. But there is also some indication that an allegation of "negligence in law" will cover any proof of violation of the safety acts.²⁹⁹

CONCLUSION

All three of the acts here involved have as their major objective the protection of individuals from the perils arising from railroad operations. Of the three, the FELA is the narrowest in terms of the nature

²⁹⁴ *Bankson v. Illinois Cent. R.R.*, 196 Fed. 171 (N.D. Iowa 1912); *Walton v. Southern Pac. Co.*, 8 Cal. App. 2d 290, 48 P. 2d 108 (1935); *Hallada v. Great Northern Ry.*, 69 N.W. 2d 673 (Minn. 1955); *Harlan v. Wabash Ry.*, 335 Mo. 414, 73 S.W. 2d 749 (1934); *Bouchard v. Central Vermont Ry.*, 87 Vt. 399, 89 Atl. 475 (1914).

²⁹⁵ See, *New York Cent. R.R. v. Kinney*, 260 U.S. 340 (1922); *Seaboard Air Line R.R. v. Koenneck*, 239 U.S. 352 (1915); *Missouri, T. & T. Ry. v. Wulf*, 226 U.S. 570 (1913).

²⁹⁶ See, *O'Donnell v. Elgin, J. & E. Ry.*, 338 U.S. 384, 391-393 (1949); *Bankson v. Illinois Cent. R.R.*, 196 Fed. 171 (N.D. Iowa 1912); *Hallada v. Great Northern Ry.*, 69 N.W. 2d 673, 682-683 (Minn. 1955).

²⁹⁷ See, *Grand Trunk Western Ry. v. Lindsay*, 233 U.S. 42 (1914); *Seaboard Air Line Ry. v. Duvall*, 225 U.S. 477 (1912); *Southern Ry. v. Peters*, 194 Ala. 94, 69 So. 610 (1915); *Stanton v. Virginian R.R.*, 119 W. Va. 658, 195 S.E. 601 (1938).

²⁹⁸ See cases cited notes 276, 277, *supra*.

²⁹⁹ *Scott v. Baltimore & O. R.R.*, 151 F. 2d 81 (2d Cir. 1945); *Wyatt v. New York, O. & W. R.R.*, 45 F. 2d 705 (2d Cir. 1930).

of duty imposed upon the carrier and the individuals who may take advantage of its protection. While the Safety Appliance Acts and Boiler Inspection Act impose a much more stringent duty and may be relied upon by more individuals, they are more limited in terms of the types of causes for which recovery may be obtained and the defenses unavailable under the FELA which are available under state laws. In view of the general nature of activity which covered by these acts, it is not surprising to discover that the vast majority of actions fall within the area in which the FELA and the safety acts overlap, and where they supplement each other in giving a comprehensive system of protection to the employee of an interstate carrier. While the ability of Congress to make the safety acts applicable to others indicates that it might also have provided such comprehensive protection for all persons injured, it has not seen fit to do so. Undoubtedly this arises from some belief that the stringent duty imposed upon the carrier, unencumbered by certain common law defenses, should primarily be directed toward those who give the greatest benefit to the carrier, its employees. The other large class of persons conferring benefits on the carrier, the passengers, were already protected by the common law imposition of "the highest duty of care" on the part of the carrier.³⁰⁰ The author is inclined to agree that the present coverage of these acts is adequate.

³⁰⁰ See, *e.g.*, CAL. CIV. CODE §2100 (West 1955) which purports to be a recital of the common law duty of a carrier for hire. The duty has been made more stringent by the use of a presumption based on *res ipsa loquitur*, see *Housel v. Pacific Elec. Ry.*, 167 Cal. 245, 139 Pac. 73 (1914); *McCurrie v. Southern Pac. Co.*, 122 Cal. 558, 55 Pac. 324 (1898). See also, PROSSER, TORTS 147 (2d Ed. 1955).

